SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.,

Petitioner,

v.

NATIONAL BANKAMERICARD INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Worthen Bank & Trust Company, N. A. (hereinafter referred to as "Worthen"), petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 14, 1973.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Arkansas (A-23) is reported at 345 F.Supp. 1309. The opinion of the Court of Appeals for the Eighth Circuit (A-1) is reported at ..... F.2d .....

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on September 21, 1973. A

timely petition for rehearing was filed on October 5, 1973, and denied on October 24, 1973. The judgment of the Court of Appeals was stayed pending the filing of a petition for writ of certiorari in this Court on or before December 10, 1973. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the adoption, by an association of independent and separate banks joined together to promote and administer a national bank card system, of a bylaw prohibiting members from participating in, and denying membership to banks which particiate in, any competing bank card system, constitutes a group boycott or customer restriction and is thus a *per se* violation of Section 1 of the Sherman Act.

STATEMENT

The question presented was answered affirmatively by the trial court which, holding the bylaw in question to constitute a *per se* violation of the antitrust laws, granted Worthen, the plaintiff below, a partial summary judgment enjoining enforcement of the bylaw. Recognizing "the novelty and importance of the question" presented by this case (A-14) and deeming it to be a "case of first impression" (A-21), the Court of Appeals, after oral argument, invited the Department of Justice to file an amicus brief. The Government's statement of the interest of the United States in doing so is an appropriate preface for the statement of the case which follows:

> "The present case marks the first major application of the antitrust laws to national bank credit cards, a new, but fast-growing service industry. Proper application of the antitrust laws so as to insure the greatest degree of competition in this industry is an important

and difficult matter." Brief for the United States as Amicus Curiae, p. 2.

The Growth And Operation Of The National Bank Card Systems[1]

Although for many years individual banks or small groups of banks have issued bank credit cards and administered credit card programs on a local scale, the national bank card industry as such is less than a decade old. Its origins may be traced to the Bank of America in California which in 1966 began licensing the BankAmericard service marks to other banks on the west coast. By 1970 the Bank of America had hundreds of licensees throughout the United States and through comprehensive regulations imposed upon its licensees, administered a bank card program of national scope competitive in all respects to the well-established travel and entertainment cards such as American Express, Carte Blanche, and Diners Club. A person issued a BankAmericard by his local bank could travel throughout the United States using his bank card to make purchases which would eventually be charged to his account by the bank which had issued him the card. Contemporaneously with the expansion of the Bank of America's licensing program, another group of banks organized and began to seek new members for Interbank Card Association, which now administers the Master Charge program.

In 1970 the licensees of the Bank of America formed respondent, National BankAmericard Incorporated (hereinafter referred to as "NBI"), a membership corporation whose purpose was to take over the domestic administra-

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[1] The description in this subsection and the following one is supported by the record, and it appears in various forms in the opinions of the courts below and the briefs of the parties and the Government. There is no serious dispute about how the national bank card systems work.

tion of the BankAmericard system from the Bank of America. Two classes of membership were established: Class A or card-issuing banks and Class B or merchant-agent banks. Only Class A banks have voting rights and are represented on the Board of Directors and operating committees of the corporation. Each Class A bank issues its own BankAmericard to cardholders with whom it has contracted and enters into agreements with merchants. The merchant agreement (1) obligates the merchant to accept as payment a BankAmericard issued by any Class A bank, and (2) requires the contracting bank to purchase from the merchant at a discount all sales drafts thus generated. Class B membership is available to a bank which has entered into an agency arrangement with and is sponsored by a Class A bank. The agent or merchant (Class B) bank is required to solicit cardholders for its Class A sponsor, to contract with merchants in its community, and to purchase from such merchants BankAmericard sales drafts which are in turn sold by the agent bank to its principal. The Class A bank earns money from its bank card program through the merchant discount, the interest earned on a cardholder's account, and the indirect banking business generated by attracting new customers — cardholders, merchants, and correspondent banks — to the bank. The indirect banking business consists of the merchant's opening of a commercial checking account at the bank in order to facilitate the deposit of sales drafts, the cardholder's opening of a checking account in order to take advantage of certain features which the bank makes available to its cardholders (such as overdraft checking or the use of cash dispensing machines activated by a magnetic stripe on the plastic bank card), the merchant or agent bank's maintenance of an account in order to facilitate the receipt of credit for sales drafts, and other kinds of banking business which are likely to result when a bank puts merchants and customers in its community and

banks in other communities in the habit, initially through a bank card program, of doing business with the bank. The agent bank may obtain many of the same benefits since the principal bank may allow it to keep all or part of the merchant discount, to share in the receivables generated by cardholder accounts which it has solicited, and to have its name appear on cards issued by the principal bank to cardholders solicited by the agent.

Today there are two national bank card systems: the BankAmericard system administered by NBI and the Master Charge system administered by Interbank. Each system operates in essentially the same manner pursuant to certain rules and regulations designed to assure that a bank card presented to any participating merchant anywhere in the country will be honored by that merchant regardless of whether it has a contractual relationship with the bank which issued the card. These rules and regulations deal primarily with the interchange of sales drafts among member banks and the authorization which merchants must obtain, ultimately from the card-issuing bank, before accepting the card for purchases which exceed a certain amount. The rules and regulations of both systems, at least prior to the adoption of the bylaw in question, left the member banks essentially autonomous in decisions affecting their bank card competition with other banks, either banks within the same system or banks in the other system. A Class A bank is free to negotiate its own terms and discount rates with merchants, to establish whatever interest rates and other services it provides its cardholders, to negotiate its own arrangements with agent banks on whatever terms it desires, to provide lower merchant floor limits (above which authorization must be obtained) than the maximum ones established on a system-wide basis, to make its own credit decisions as to whom it will issue cards and as to the appli-

cable credit limits it will authorize for its cardholders, and to promote the card which it issues as little or as much as it desires. Since neither system attempts to impose any territorial restrictions on the bank card operations of its members or to limit in any way the number of banks within a single community which it will admit to membership, there is often intense bank card competition between banks participating in the same system, and where such competition exists, it is frequently more vigorous than that between banks participating in different systems.[2]

Dual Membership And NBI's Prohibition Thereof

At the present time most of the merchants in the country who honor one bank card, honor the other also. A substantial number of cardholders hold both a BankAmericard and a Master Charge card. Because of the desire of merchants to honor both cards and because of the convenience to them of being able to deposit sales drafts generated by both cards with the same bank (opening one checking account rather than two), several hundred banks were participating as agent or merchant banks in both systems at the time NBI was formed. And because such dual agent banks were able to offer to merchants the convenience of dealing with a single bank, they obviously enjoyed a competitive advantage over other banks in signing up mer-

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[2] In *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 326 n. 5 (1963), this Court, finding bank credit cards to be among the cluster of "products" and services offered by individual banks, recognized that "competition among banks exists at every level . . . and it is keen." In a study of bank card competition, NBI's Vice-President noted that merchants benefit from the discount rate cutting that is more likely to prevail where competing banks in a community are members of the same system rather than different ones. Russell, *Two-Cards — One Market, a Study in Charge Card Competition*, at 45-46 (1968).

chants to their bank card programs.[3] It was to counteract this advantage that a number of card-issuing banks throughout the country began to participate as agent banks in the other system.

Shortly after NBI was formed, Worthen, as a former licensee of the Bank of America and as one of the charter Class A members of NBI, applied for and obtained membership in Interbank as a card-issuing bank. Worthen saw an opportunity to be able to offer the residents of Arkansas both cards, to offer a single depository for merchants in its community desiring to honor both cards, and to nurture correspondent relationships by sponsoring in both programs banks which desired dual merchant or agent bank status. At the time Worthen became a member of Interbank, there was nothing in the bylaws of either NBI or Interbank prohibiting such dual membership. In fact, at that time and to the present, an Interbank bylaw expressly disclaims any such prohibition.

After Worthen was accepted for membership in Interbank, NBI, on October 14, 1971, amended its bylaws to prohibit certain forms of dual membership, including that which Worthen had recently acquired. Section 2.16 of NBI's bylaws, set out in full in Appendix B hereto, prohibits Class A or card-issuing members of NBI from participating in any manner whatsoever in a competing national bank card program. It also prohibits Class B or agent-merchant banks in NBI from serving as card-issuing

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[3] As early as 1968, the Federal Reserve System in a study entitled "Report: Bank Credit-Card and Credit-Check Plans," observed:

> "In some cases, small banks competing with large banks have taken advantage of the potentialities of agency status to sign up as agents of two competing card systems. This gives them the advantage, in signing up merchants, of offering two types of card plans for a single account." p. 287.

banks in a competing bank card system.[4] *It does not prohibit a Class B member of NBI from serving as an agent-merchant bank in a competing system.* The bylaw thus prohibits Worthen and other Class A members of NBI from: (1) issuing Master Charge cards, (2) purchasing Master Charge sales drafts from merchants or Interbank agent-merchant banks, and (3) agreeing to purchase BankAmericard sales drafts from card-issuing members of Interbank. If Worthen wishes to compete effectively with dual merchant banks in its community, it must relinquish its Class A, card-issuing status in both NBI and Interbank.

The Proceedings Below

Immediately after NBI's adoption of Section 2.16, Worthen filed this suit as a class action on behalf of banks in both systems to enjoin its enforcement on the ground that it constituted a *per se* violation of Section 1 of the Sherman Act. Worthen moved for partial summary judgment after engaging in enough discovery to be able to demonstrate without contradiction that the bylaw was intended, among other things, to deprive Class A members of NBI of the competitive advantage which they would otherwise have had by participating in the Master Charge program and that this deprivation would have an adverse effect upon competition among banks, particularly between card-issuing banks in either system and dual merchant banks in both.[5] The trial court granted partial summary judgment

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[4] The bylaw contains no provision for a hearing and no method of obtaining an exception based on individual competitive circumstances. It also is worded so as to ban dual participation in bank card systems other than the two present national ones. The record is clear that, as a matter of law, the bylaw is drafted much broader than it need be, even to meet NBI's asserted objections to duality, and also that it can only tend to preserve the existing duopoly at the expense of possible new entrants to the bank card business.

[5] In a letter to NBI prior to adoption of the restrictive bylaws,

enjoining enforcement of the bylaw on the ground that it constituted a group boycott and thus a *per se* violation of Section 1.[6] To eliminate any factual dispute as to other reasons assigned by NBI for adoption of the bylaw, and for purposes of its motion for summary judgment only, Worthen conceded:

> "that NBI acted in complete good faith and for legitimate business reasons (including the desire to preserve and foster competition between the two national bank card systems) in passing Section 2.16; that the by-law in fact serves a legitimate business purpose of NBI and promotes competition between NBI and Interbank; that in spite of the bylaw, there will be vigorous competition in the bank card business; and that without the bylaw there would be a substantial lessening of

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NBI's counsel noted that Section 2.16 "in some respects restrains commercial freedom" and "would in some degree adversely affect their [Class A banks] competition with dual B banks. . . ." The letter was obtained by Worthen during discovery procedures and appears as document P/122, the quotation being from pages 8 and 9, of the appendix to Worthen's memorandum in support of its motion for summary judgment, copies of which were filed with the Court of Appeals. See also, Deposition of D. W. Hock, President of NBI, Court of Appeals Appendix, pp. 242-243; Deposition of Charles Hamel, Vice-President of NBI, Court of Appeals Appendix, p. 233; Deposition of John A. Dillon, Executive Vice-President of NBI, Court of Appeals Appendix, pp. 292-93; where these NBI officers recognize that dual banks would "have a better deal to offer merchants" and a "more competitive tool in seeking merchants," and that Section 2.16 creates potential competitive problems for a card-issuing bank in one system when there is a bank in the same community that is an agent bank in both bank card systems. And the NBI staff was clearly aware that it "would not be a simple undertaking" to "show substantial competition between ICA [Interbank] and NBI as distinguished from the obvious competition between constituent banks." Deposition of James Ravlin, general counsel of NBI, Court of Appeals Appendix, p. 273.

[6] The trial court refused to certify the case as a class action, and Worthen did not appeal this ruling because the injunction entered by the trial court seemed to prevent enforcement of the NBI bylaw against any bank.

competition between Interbank and NBI and eventually a merger of the two systems."

These were the only arguments which were advanced by NBI to demonstrate the reasonableness of the bylaw.

On NBI's appeal, and after requesting upon its own motion and receiving the Government's post-oral argument amicus brief unprecedently suggesting that the *per se* rule should *not* have been applied by the trial court,[7] the Court of Appeals reversed the trial court's partial summary judgment in favor of Worthen. The court below did not question that the challenged NBI bylaw prohibiting dual membership in national credit card systems was the product of the concerted and horizontal effort of competing economic entities, member banks of NBI. It did not question that the bylaw excludes from membership in NBI banks which refuse to abandon their participation in the Master Charge system and that the bylaw was thus "designed to influence the trade practices" of banks such as Worthen. (A-11). Nor did the court below disagree that the bylaw, which prohibits members of NBI from entering into agency arrangements with banks which are card-issuing members of Master Charge, has the economic consequence "that distinct economic entities no longer maintain the independence which is essential for the functioning of a free market" (A-11). Instead, the court below suggested that there are "divergent types of concerted activity" (A-11) which, though having such designs and consequences, are not *per se* unlawful if the trier-of-facts can devine "*any* redeeming vir-

[7] In spite of its recommendation of a remand, the Government characterized the trial court's opinion as "thoughtful and responsible," and acknowledged that a remand might prove that the "district court is correct, and that the restraints imposed by By-Law 2.16 are . . . so harmful as to be illegal *per se*." Amicus Brief, p. 13.

tue" therein (A-16). At least, according to the lower court, purporting to rely upon this Court's decision in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), that is the test to be applied when the case involves "a very large and important segment of our economy" (A-21), and when the question presented is one of "novelty and importance" (A-14). Finding such to be the case here, the lower court concluded that the following factors prevented application of a rule of *per se* illegality to Section 2.16: (1) the court's "lack of definite information relating to competition" in the bank card industry, (A-21); (2) the possibility of some "redeeming virtue" in the challenged bylaw (A-16); (3) the existence of "economic justification" for the formation of an association such as NBI to produce a product which no bank acting alone could produce (A-16); and (4) the possibility that the bylaw might be necessary for "preserving" such an association (A-16).

REASONS FOR GRANTING THE WRIT

1. Before examining the extent to which the decision below conflicts with prior decisions of this Court, it is important to emphasize why this Court should at this time review a decision which does not determine the legality of Section 2.16 but merely remands, for further factual inquiry, the issue of its reasonableness. Worthen respectfully suggests two reasons why review at this time is essential:

(a) The reasoning of the court below threatens to destroy the continued viability of the *per se* rules in antitrust enforcement. The Government has acknowledged the importance of this case to antitrust enforcement, and Worthen respectfully suggests that the *per se* rules — which, as most recently reiterated by this Court in *United States* v. *Topco Associates, Inc.,* 405 U.S. 596 (1972), provide a guide of conduct for businessmen and a means of

preventing courts and juries from becoming enmeshed in time-consuming and often fruitless balancing of economic interests — are in jeopardy if the decision below is allowed to stand. The decision below simply stands for the proposition that businessmen who band together, whose "initial purpose in forming the joint venture . . . is obviously not illegal" (A-21), and who refrain from "price fixing or exclusive territorial allocations" (A-21), may nevertheless engage in concerted refusals to deal and immunize the same from *per se* analysis by pointing to the "importance of the industry" in which they are engaged and by conceiving "*any* redeeming value" in their otherwise anticompetitive conduct. So doing, they will require courts which are "ill-equipped and ill-situated for such decision making" to weigh the "destruction of competition in one sector of the economy against promotion of competition in another sector." 405 U.S. at 610. In spite of the facts that *Topco* dealt with groceries rather than bank cards and that this case, unlike *Topco*, does not involve territorial restrictions, the approach of the court below cannot be harmonized with the approach of this Court in *Topco*. To paraphrase *Topco* as it applies to this case:

> Courts are ill-equipped to weigh the destruction of competition among banks against the promotion of competition between the two national bank card systems. Section 2.16 is not to be tolerated simply because it was promulgated in the interest of increasing competition. The freedom of a bank to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster, including the participation in two national bank card programs — cannot be foreclosed simply because a group of banks known as NBI believe that such foreclosure might promote greater competition in the allegedly more important area of competition between NBI and Interbank. NBI and its board of directors and officers have no authority under the Sherman Act to determine the respective

values of competition in various sectors of the bank card business. It may well be that as a result of competition among banks participating in both national bank card systems, each is destroyed or an eventual merger results. But the task of preventing such a merger, if not in the public interest, is for Congress and *not* for NBI's board of directors or the courts. NBI's board members are too keenly aware of their own interests in making that decision and the courts are ill-equipped and ill-situated to assess the probability of the merger which NBI predicts will eventuate and to weigh the harm flowing from such a merger against the harm of preventing Worthen and other banks from handling whatever products they desire.

(b) Apart from preventing a general erosion of the *per se* rules, there is a second and equally compelling reason why this Court should review the decision of the court below at this time rather than after a full trial and subsequent appeal. Everyone involved, including the court below, has recognized the importance of this case to a relatively new and rapidly expanding sector of the economy. In a case involving one litigant's right to recover damages from the other, an erroneous refusal to apply the *per se* rules merely results in added burden and expense to that litigant, can be corrected upon final hearing and appeal, and does not threaten irreparable injury to the industry involved. Here, however, the relief sought — an injunction against enforcement of the bylaw — is primarily prospective and its erroneous denial, or its erroneous deferral until after a lengthy trial on the merits, will stifle the competitive growth of an entire industry. So long as the eventual outcome of this lawsuit is unresolved, banks which wish to increase their competitive vigor by becoming dual members or to protect themselves from the competitive advantages enjoyed by the dual agent banks will be reluctant, regardless of any preliminary injunction against the enforcement of Section 2.16, to make the substantial investment re-

quired to administer another bank card program. In short, if the lower court was in error, as Worthen believes it was, this case is too important to the bank card industry to postpone the correction of that error until after a trial on remand and subsequent appellate review.

2. The decision of the court below, in suggesting that group boycotts and customer restrictions may be reasonable, is in direct conflict with this Court's decisions in *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Nationwide Trailer Rental System, Inc.*, 355 U.S. 10 (1957), *affirming per curiam* 156 F. Supp. 800 (D. Kan.); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969); and *United States* v. *Topco Associates, Inc., supra.*

In all of the above cases this Court condemned as *per se* unlawful concerted refusals to deal, whether taking the form of group boycotts or horizontally imposed customer restrictions. All of these cases demonstrate that there is really nothing unique or novel about a group of competing business entities banding together to further their common, and indeed wholly legitimate, goals and attempting at the same time, by various membership rules, to exclude from their midst others who refuse to abandon certain competitive practices, or agreeing among themselves not to do business with those who refuse to abide by certain trade practices. In each of these cases there was clearly some "redeeming virtue" in what the various groups were trying to accomplish by means of their exclusionary rules. The Eastern States Lumber Dealers Association was attempting to prevent the destruction of retail lumber facilities; the Fashion Originators' Guild, style piracy; the American Gas Association, the sale of unsafe burners; the New York Stock

Exchange, the dealing by member firms with unreliable boiler-shop operations; the Nationwide Trailer Rental System, the forwarding of trailers to persons with divided loyalties because they belonged to competing systems; Topco, the destruction of interbrand competition. With perhaps the exception of the first two, in none of these cases could it be reasonably contended, or was it, that there was "no independent economic justification for the group" (A-18), one ground upon which the court below sought to distinguish these cases from the instant one. In many of these cases it could hardly have been contended, nor was it, that the "association of the members was *not* required by industry structure in terms of the ability to produce the product" (A-18), another ground suggested by the lower court as distinguishing these cases from the instant one. It would be hard to imagine nationwide securities trading, national news services, or one-way trailer rental without some group activity. But the necessity and lawfulness of joining together for certain purposes and group activities has never, until the lower court's decision, been deemed relevant in assessing the legality of exclusionary activity designed to influence the competitive practices of either members or non-members. In none of these cases, with the exception of *Nationwide Trailer, Citizen Publishing,* and *Topco,* was there an aggregation of other kinds of trade restraints such as price fixing or territorial allocations. Not only has this Court made it abundantly clear that a concerted refusal to deal or a customer restriction is not saved by proof that there was no price fixing or territorial allocation,[8] even in those cases where such other restraints were present, nothing was said by this Court to indicate that its

[8] See, *e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n. 7 (1959) (where the Court noted that a group boycott is not saved by proof that it is not intended to have an "effect on prices"); *Silver* v. *New York Stock Exchange, supra,* at 348 n. 5 (where the Court stated that it is "enough" that

decisions turned upon the aggregation of such other restraints.[9]

In the *Associated Press* case, the Court, relying on the group boycott cases, held that it was *per se* unlawful for the AP to impose onerous terms on the admission to membership of an applicant who competed with a present member of the association. One of such onerous terms was that, as a prerequisite to membership, the applicant had to relinquish any exclusive rights he might have to any news service other than AP when requested to do so by the member-competitor located in his area.[10] Had the NBI bylaw in question provided that an applicant for membership in NBI had to relinquish its membership in Interbank upon the request of an NBI member-competitor located in the same area, there could be no question of the applicability of *Associated Press* to this case. But because the NBI pro-

"a valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action"); *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966) (where the Court expressly noted that neither *Fashion Originators'* nor *Eastern States Retail Lumber* involved price-fixing).

[9] The idea that a concerted refusal to deal is somehow immunized from *per se* analysis if other trade restraints are absent, if there is economic justification for the group that engages in it, or if the product or service provided by such group cannot be provided by its members acting alone, not only has no basis in this Court's opinions but has, prior to the instant case, never been advanced by the lower courts in following those opinions. See, *e.g.*, *Washington State Bowling Prop. Ass'n.* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), cert. denied, 384 U.S. 963; *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972); *Vandervelde* v. *Put & Call Brokers & Dealers*, 344 F.Supp. 118 (S.D.N.Y. 1972); *Gray Line, Inc.* v. *Gray Line Sightseeing Companies Associated, Inc.*, 246 F.Supp. 495 (N.D. Calif. 1965); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Calif. 1971); *Blalock* v. *Ladies Professional Golf Ass'n.*, 1973 CCH Trade Cases ¶ 74,597 (N.D.Ga. 1973).

[10] Other AP bylaws prohibited members from selling either news which they were obligated to furnish AP or AP news to nonmembers in advance of publication. As to those bylaws, this Court affirmed the trial court's refusal to hold that "standing by

hibition is indeed broader, denying membership to any Interbank member regardless of where it is located, the court below erroneously concluded that there was nothing to indicate that Section 2.16 was designed "to enable member banks to be free from competition from other competing banks." (A-19). To the contrary, the record is replete with undisputed evidence that the dual membership which the bylaw seeks to prohibit is a competitive advantage insofar as "competition between member banks in the same geographical area" is concerned. In its brief on appeal, NBI candidly stated that its bylaw was intended to deprive Worthen and other banks of "the competitive advantage which would flow from" dual participation. NBI's Brief p. 26. The Government also recognized that dual membership "constitutes a significant competitive advantage" and "[t]o this extent, dual membership may be said to enhance competition between banks." Amicus Brief p. 15. Indeed, NBI's argument to the effect that dual membership will lead to an eventual merger of the two national bank card systems is premised upon a recognition that dual membership is a competitive advantage and upon an assumption that such advantage is so great that eventually all banks will become dual members if any are allowed

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themselves" they were illegal *per se*. 326 U.S. at 22. This is, in fact, the only precedent upon which the lower court relied in refusing to apply the *per se* rule to Section 2.16. But the analogy is deficient. Judge Hand in *Associated Press* simply viewed the prohibitions against sale to nonmembers as "restrictive covenants" necessary to assure that AP news releases had priority and value. 52 F. Supp. 362, 374. They did not flatly deny access to AP news since, with the restrictions on membership removed, any newspaper could join AP and thus obtain its news. Worthen has never contended that it should be able to issue or honor BankAmericards without being a member of NBI or that it should be able to market the BankAmericard through non-NBI member agent banks. The NBI bylaw, however, does much more than requiring membership as a prerequisite for access. It denies membership and hence all access to card-issuing banks in the Master Charge program.

to retain or gain dual status. Thus, while the record below does not teach everything there is to learn about competition between banks, it clearly establishes that regardless of the characteristics of such competition, the bylaw in question will to some extent restrict and limit the same.

In *United States v. Nationwide Trailer Rental System, Inc., supra,* this Court affirmed the judgment of the trial court that the following bylaw of NTRS "violates the Sherman Act by providing for a boycott . . . [and] is a violation of the Act *per se,*" 156 F. Supp. at 805-06:

> "No members of Nationwide Trailer Rental System may be connected with any other one-way trailer rental system in competition with our association members."

This Court also, by its affirmance, approved the trial court's enjoining NTRS from:

> "(C) Restricting or preventing, or attempting to restrict or prevent any person from dealing with any other person or group of persons engaged in the trade of one-way trailer rentals;
>
> "(D) Hindering, restricting, or preventing any person from joining or remaining a member of any association or organization of one-way trailer operators." *Id.* at 807.

While the court below conceded "that the *Nationwide Trailer* case has obvious similarities to this one" (A-20), it refused to be bound by it because: (1) its "legal reasoning for enjoining the provision preventing dual membership is not clear," and (2) it also involved price-fixing and territorial allocations. (A-20). Worthen respectfully submits that the legal reasoning of the trial court in *Nationwide Trailer* was clear enough for this Court to be able to affirm *per curiam* its decision, and that nothing said in the trial court's opinion or in any opinion of this Court suggests the

necessity for an aggregation of trade restraints in order that a group boycott be condemned as *per se* illegal."[11]

To be sure, there is nothing in this case identical to the territorial restrictions imposed by the Topco members on each other. Topco members agreed not to compete with each other to any extent; NBI members have agreed only that they will not compete with each other in certain ways, *i.e.*, that none will utilize the competitive advantage provided by dual membership. There is, however, in this case a horizontally imposed customer restriction precisely like the one condemned in *Topco* as *per se* illegal: Section 2.16 prohibits any card-issuing member of NBI from entering into agency arrangements with card-issuing members of Master Charge in order to obtain their assistance in marketing to merchants and cardholders the bank card product which the NBI member helped to produce.[12] More im-

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[11] While the joint operating agreement condemned in *Citizen Publishing Co.* v. *United States, supra,* involved price fixing and profit pooling, it also imposed what the Court called "market control":

> ". . . It was agreed that neither the Star nor the Citizen nor any of their stockholders, officers, and executives would engage in any other business in Pima County — the metropolitan area of Tucson — in conflict with the agreement. Thus competing publishing operations were foreclosed." 394 U.S. at 134, 22 L.Ed.2d at 154.

Saying nothing to indicate that its holding turned on the aggregation of restraints, this Court found that "the agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act . . . so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field." *Id.* at 135-6.

[12] One possible explanation of the lower court's failure to observe the similarity between the customer restriction involved here and that in *Topco,* is it erroneous characterization of *Topco* as dealing with a prohibition of "the resale of goods at wholesale prices," A-17, and as being a case involving "price restraints," A-18. It is clear, however, that since Topco members were free to sell to consumers at any price they desired, this Court regarded Topco's restriction on wholesaling as a "restriction on customers," 405 U.S. at 604, rather than a form of price restraint. Indeed, the Court expressly noted that "[t]o

portantly, the "any redeeming virtue" test applied by the lower court is clearly at odds with everything this Court said in *Topco*.

3. The court below has erroneously construed this Court's decision in *White Motor Company* v. *United States, supra*, as sanctioning the application of the "rule of reason" to group boycotts in a new industry.

This Court's decision in *White Motor* does not remotely suggest that the newness of an industry or the uniqueness of its problems has anything whatsoever to do with whether the restraints it imposes constitute *per se* violations of the Sherman Act. *White Motor* involved an old industry which presented "the first case involving a territorial restriction in a vertical arrangement" in any industry. 372 U.S. at 261. This Court wanted to know more about the nature of the restraints and not more about the automobile industry. And nothing that the Court said in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), when it held such vertical restraints to be *per se* illegal, indicated that the question turned in any way on the nature of competition in the particular industry involved. Indeed, when the court in *AP* cited and relied on *Fashion Originator's Guild*, and when in *Topco* it cited and relied on *AP*, it never for a moment paused to consider that each case arose in a different industry context. If, as the lower court read *White Motor*, "the novelty and importance of the question was the determining factor in applying the rule of reason" in that case, (A-15), then the same considerations would have required application of the rule of reason in *Schwinn*, *Topco* and *Associated Press*. Few questions reach this Court which are not novel and important!

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the extent Sealy casts doubt on whether horizontal territorial limitations, *unaccompanied by price fixing*, are *per se* violations of the Sherman Act, we remove that doubt today." 405 U.S. 596, 609 n. 10 (Emphasis added).

CONCLUSION

It is the very novelty and importance of the question presented by this case which justifies this Court's reviewing the same at this time. The record in the trial court may not be sufficient to ascertain the reasonableness of NBI's bylaw. But the record, consisting of answers to interrogatories, depositions and affidavits of NBI officers, documents from NBI's files, and the bylaws and regulations of both NBI and Interbank, is clearly sufficient to allow this Court to determine whether the *per se* rule should have been applied. For if the trial court was right and the Court of Appeals wrong, the participants in the national bank card industry will be assigned to competitive strait jackets during the period required for the far-reaching factual inquiries which the lower court suggested in remanding. While these participants have not been restricted by their competitors as to where they can sell or at what price, they have, upon pain of expulsion or non-admission, been unequivocally restricted in what they can sell and to whom. This is hardly "the freedom guaranteed each and every business . . . to compete — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Associates, Inc.*, 405 U.S. at 610.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing Petition for Writ of Certiorari have this the .... day of December, 1973, been served upon each counsel of record for respondent in accordance with Rule 33 of this Court, by depositing the same in the United States Mail with first-class postage prepaid, addressed to said counsel at their post office addresses.

.....

Stephen D. Susman

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 72-1555

WORTHEN BANK & TRUST COMPANY,
Appellee,

v.

NATIONAL BANKAMERICARD INCORPORATED,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Submitted: February 14, 1973
Filed: September 21, 1973

Before GIBSON and Ross, Circuit Judges, and BENSON, Chief District Judge.*

Ross, Circuit Judge.

This is an appeal from an order granting partial summary judgment to the plaintiff in an antitrust action, based upon a

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* Paul Benson, Chief District Judge, District of North Dakota, sitting by designation.

holding by the trial court that the defendant had committed a "per se" violation of Section 1 of the Sherman Act. We reverse and remand for trial.

I. *History*

A. Procedural Background.

On November 26, 1971, the Worthen Bank & Trust Company (Worthen) filed its complaint on behalf of itself and a class of banks charging that National BankAmericard Incorporated (NBI) had adopted a bylaw, which if enforced would constitute a "group boycott" in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Worthen sought damages and an injunction. NBI and Worthen entered entered into a stipulation that NBI would not enforce the bylaw pending determination of this litigation. On April 10, 1972, Worthen filed a motion for summary judgment. NBI filed affidavits in opposition. The motion was argued on June 20, 1972 and on July 19, 1972, the court held that enforcement of the bylaw would constitute a "group boycott" per se violative of Section 1 of the Sherman Act. *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.,* 345 F.Supp. 1309 (E.D.Ask. 1972). On August 7, 1972, the court entered an order permanently enjoining NBI from enforcing bylaw 2.16[1] Appeal from that order was taken pursuant to the provisions of 28 U.S.C. § 1292(a)(1).

1. The parties[2]

B. Statement of Facts

a. NBI

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[1] The determination of damages was held in abeyance pending appeal. In addition, the court determined that the action was not properly maintained as a class suit. *See Worthen Bank & Trust Co.* v. *National BankAmericard Inc.,* 345 F.Supp. 1323 (E.D. Ark. 1972).

[2] After oral argument of this case it became apparent that any decision in this case would affect the bank credit card industry

NBI is a for profit, nonstock, membership corporation comprised of commercial banks and established to produce and promote bank credit cards. Membership in NBI is divided into two classes of banks which are denominated *A* and *B* banks. *A* banks issue cards, extend credit, and perform all functions necessary to maintain the system. *A* banks are liable for fees to defray the expense of NBI and are entitled to any rebates and dividends and govern NBI by membership on its board of directors and on advisory committees. *B* banks act only as agents for *A* banks. The *B* bank status does not permit the bank to issue credit cards but does permit these banks to offer credit card service to merchant customers.[3] NBI is comprised of about 250 *A* banks and approximately 4,100 *B* banks.

b. Interbank/Master Charge

Interbank/Master Charge (MC), not a party to this suit, is a membership corporation which is comprised of regional banking associations and individual banks established to produce and promote bank credit card services. MC does not formally characterize its members by class, although it also has both card issuing and agent bank members, and

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generally Since the importance of the bank credit card industry to the general public was undisputed, the Court, on its own motion, invited the United States to submit a brief as amicus curiae. *See* F.R.A.P. 29. The Department of Justice has filed a brief urging reversal.

[3] According to the President of NBI:

> "Class B banks act as agents for Class A banks and solicit and sign contracts with merchants for their sponsoring Class A banks, but do not issue cards or own cardholder accounts. They purchase sales drafts from merchants and forward them to their sponsoring Class A banks for processing, but do not otherwise participate in the interchange of such drafts. . . . The agent bank status permits smaller banks to offer credit card services to merchant customers, accepting their sales drafts but not carrying their outstanding credit, since they are reimbursed by their respective sponsoring Class A banks. . . ." App. 71.

is considered the larger of the two national bank credit card systems.

c. Worthen

Worthen is a bank incorporated and organized under the laws of Arkansas with its principal place of business in Little Rock, Arkansas. Worthen is an *A* bank in the NBI system, and is also an issuing bank of MC.

2. The bank credit card industry.

a. History

The national bank credit card industry has grown rapidly since its inception. By the end of 1971 the gross dollar volume in the industry exceeded eight billion dollars. NBI controlled some $3,370,000,000 and MC about $5,000,000,000. In every other respect, from cardholders to merchant outlets, MC was the larger system. NBI and MC are the only national bank credit card systems, although these bank credit cards compete with other types of cards such as regional bank cards, oil credit cards, and travel and entertainment cards.

b. The mechanics of the system.

For a national bank credit card system to operate four requirements must be met. First, there must be credit card issuing banks, tied together with other banks on a nationwide basis, willing to accept the commercial paper generated by the use of the card at points both near and distant to the card issuing bank. Second, merchants must be willing to accept the card in lieu of payment in currency. Third, there must be a process whereby a merchant can take the sales draft, generated by the use of the card, to a bank and have the paper purchased. The "merchant's" bank must then be able to transfer the paper to the card issuing bank. This process is called interchange. Finally, to insure the integ-

rity of the system, there must be a process whereby the validity of the card and the availability of credit may be established prior to a purchase.

c. The potential for profit.

A banks may profit from a national credit card system by charging cardholders interest on accounts not paid in full on the first billing; by acquiring, at a discount, merchant's sales paper, and by increased merchant business through the satisfactory handling of a merchant's sales paper. *B* banks may earn revenues through discounts charged to the merchant and from "spill over" business resulting from its handling of the merchant's sales paper.

d. The importance of computer technology.

Both systems are actively engaged in improving authorization capabilities by increasing computer utilization. Thus:

> "NBI is presently developing a computerized national authorization system. . . . NBI's initial intent is to develop a nationwide communications system controlled by a central computer and several regional computers, which can be connected to electronically or optically engineered terminals in merchant or branch locations, capable of reading magnetically or optically encoded cards and providing virtually instantaneous communications for authorizations . . . ." App. 82-83.

MC:

> "recently formed a subsidiary called International Communication Systems, Inc., ... It is working on providing computer links so that computers in one city can interface with each other and directly authorize cardholder transactions. [MC] is constantly reviewing and trying to improve its interchange system, including its charge-back and clearing procedures." App. 99.

3. NBI's bylaw 2.16.

While NBI does *not* set uniform merchant discount rates, does it establish uniform interest rates, nor does it make exclusive territorial assignments, NBI *does* prohibit *A* banks, like the Worthen Bank, from joining the MC system, or any new national system, by penalty of loss of *A* status. The bylaw complained of in this suit provides in pertinent part as follows:

> "Section 2.16 Requirements with Respect to other Credit Cards.
>
> (a) No Class A member shall directly or indirectly (i) own, (ii) issue, (iii) assist in the issuance of (iv) service, (v) honor, or (vi) enter into contractual relationships with persons for the issuance of, or with merchants to honor, any Credit Cards except (1) as permitted pursuant to sections 2.04 and 2.05, (2) Area Credit Cards, and (3) Credit Cards owned or issued by any organization licensed to conduct the BankAmericard program in a foreign country.
>
> (b) No Class A member shall directly or indirectly accept for deposit or purchase any instruments arising from the use of any Credit Cards except those arising from (i) Credit Cards issued pursuant to sections 2.04 and 2.05, (ii) Area Credit Cards, and (iii) Credit Cards owned or issued by any organization licensed to conduct the BankAmericard program in a foreign country.
>
> (c) No class B member shall directly or indirectly (i) enter into contractual relationships with persons for the issuance of Credit Cards except as may be permitted by section 2.05 or (ii) own or issue in its own name Credit Cards, or (iii) appear on Credit Cards or elsewhere as the owner or issuer thereof, except Area Credit Cards.
>
> (d) If a parent, subsidiary or affiliate of a member takes any action which the member may not take

under the provisions of this section, such member shall be deemed thereby to have violated this section unless, in the case of affiliates, (i) there are no common officers or employees engaged in the management or operation of both BankAmericard and other Credit Card programs and (ii) the operations—including, without limitation, marketing, authorization, credit, collection and solicitation—of such programs are separate; provided that paragraph (c) shall not apply to parents, subsidiaries and affiliates which are Class A members. The provisions of section 2.15 shall apply, without limitation, to all officers and employees engaged in the operation of a member's Credit Card program and to all directors of members.

(e) The provisions of this section shall not apply during periods necessary to (i) convert a credit card program to or from the BankAmericard program or (ii) make an adjustment to a Credit Card program as required for compliance with this section, provided such conversion or adjustment is completed in accordance with such conditions and in such time as the corporation may require, which time shall not exceed twelve months from (1) the effective date of this section, (2) the date of acceptance of membership, (3) the date of delivery of notice of termination, or (4) the date of any future acquisition, merger or other circumstance which necessitates an adjustment hereunder, as the case may be.

(f) 'Credit Cards' as used in this section mean any instruments, whether in the form of a card, book, plate, coupon, or other credit device owned or issued by a bank (including any of its parents, subsidiaries or affiliates) which may be used to obtain money or to purchase or lease property or services on credit but do not include letters of credit or any such instruments usable exclusively tions 2.04 and 2.05, (2) rea Credit Cards, and

for the obtaining of money from such bank or the guaranteeing of checks.

(g) 'Area Credit Cards' as used in this section mean any Credit Cards that are owned, issued, serviced, and honored exclusively by one bank and honored by merchants having a direct contractual relationship with such bank, except that such bank may appoint any other bank as its agent with respect to the Area Credit Card program for the sole purpose of accepting for deposit sales drafts from such merchants arising from the use of such Area Credit Cards."[4]

Bylaw 2.16 does not prevent class *B* membership in both systems and there are over 900 *B* banks in more than one system. Therefore a bank may participate in both NBI and MC activities as long as the bank does now own or issue, contract to issue, or appear as the owner or issuer of either bank card. Stated differently: (1) an *A* bank in the NBI system may not become an *A* bank or its equivalent in the MC system, (2) a *B* bank in the NBI system may not become an *A* bank or its equivalent in the MC system, (3) an *A* bank or its equivalent in the MC system may not become a *B* bank in the NBI system, (4) dual *B* membership in both NBI and MC is permissible.[5]

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[4] NBI bylaws .15 also provides:

"Section 2.15 Confidentiality. No member shall publish, disclose, convey or distribute to any person or organization, including, but not limited to, any parents, subsidiaries or affiliates, any confidential or proprietary matters of the corporation, including, but not limited to, documents, ideas, products and data, without the prior written consent of the corporation, except (a) to a person or organization which (i) is rendering services to such member with respect to its BankAmericard program and to the extent that such disclosure is necessary to properly perform such services, (ii) does not compete with the corporation or its members with respect to the BankAmericard program, and (iii) agrees to hold such matters in confidence; and (b) such matters that have been publicly released by the corporation."

[5] Bylaw 2.16 also has an impact on local or regional bank credit

On the other hand, MC apparently does not prohibit dual membership. However, at least one member of MC is concerned with the problems of dual membership, as J. O. Elmer Executive Vice President of the Wells Fargo Bank and participant in the formation of MC, stated by way of affidavit:

> "If dual membership were allowed, it is not known whether banks would issue both cards. If a substantial number of major member banks in the Master Charge/ Interbank System issued both Master Charge and BankAmericard, however, there would be a reduced economic incentive to maintain two intercharge systems and competition between interchange systems would be reduced. . . ." App. 99.

4. Worthen's concessions for the purpose of summary judgment.

Worthen made the following concessions for the sole purpose of permitting the trial court to rule on its motion for summary judgment:

a. NBI acted in complete good faith and for legitimate business reasons, including the desire to preserve and foster competition between the two national credit card systems, when it passed bylaw 2.16.

b. Bylaw 2.16 serves the legitimate business purposes of NBI and promotes competition between NBI and other national credit card systems.

c. In spite of bylaw 2.16 there will be vigorous competition in the bank card business.

d. Without bylaw 2.16 there will be a substantial lessening of competition between the two national systems and an eventual merger of the two systems.

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card programs. Dual participation is apparently *prohibited* with respect to both *A* and *B* banks in NBI and any bank card program owned and operated *by more than one bank*.

e. Worthen's real interest in challenging the bylaw was to acquire a monopoly in the bank card industry in Little Rock, Pulaski County, and Arkansas.
f. NBI's card cannot be produced by any single bank, and the production of the card requires the joint efforts of all banks within the system.

5. Summary of the district court holding.

The district court determined first that NBI was a horizontal combination of competitors based upon the rationale found in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). The court then went on to characterize bylaw 2.16 as threatening a group boycott per se violative of Section 1 of the Sherman Act. *See e.g., Associated Press* v. *United States*, 326 U. S. 1 (1945). By characterizing the restraint as a per se violation the reasonableness question was foreclosed.

II. *Section 1 of the Sherman Act*

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits agreements in restraint of trade. While not all agreements which restrain trade violate the Act, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911), those agreements which are unreasonable are violative of the Act. The Supreme Court has further declared that certain agreements are so consistently unreasonable that the question of reasonableness is foreclosed; that is, certain agreements are per se violative of the Act.

Among those types of agreements which have been classified as per se violations are those known roughly as "group boycotts". *See e.g., Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941). While no one definition of a "group boycott" is particularly suitable, the Fifth Circuit has suggested, in *McQuade Tours,*

Inc. v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178, 186-187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), that group boycotts generally involve either:

1. horizontal combinations among traders to exclude direct competitors from the market. *See e.g., Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914), or,
2. vertical combinations to exclude competitors of some of the members of the combination. *See e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), or,
3. combinations designed to influence the trade practices of boycott victims rather than eliminate them as competitors. *See e.g., Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission, supra*, 312 U.S. at 457.

The economic consequences of a "group boycott" are that distinct economic entities no longer maintain the independence which is essential for the functioning of a free market. *See* Barber, *Refusals to Deal Under Federal Antitrust Law*, 103 U.Pa. L. Rev. 847, 875-876 (1955); Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv.L.Rev. 1531, 1533 (1958).

The term "group boycott", as suggested above, is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the "group boycott" and "per se" labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed. While as a matter of broad classification these types of labels provide businessmen with intelligible and predictable guidelines for the conduct of business activity, *see United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609 n.10 (1972), and while these labels obviate the tremendous burden trial courts must un-

dertake when applying the rule of reason, *id.* at 609, we emphasize that:

> "'It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to finding illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden.'" Elman, *"Petrified Opinions" and Competitive Realities,* 66 Col.L.Rev. 625, 627 (1966) *quoted in Albrecht* v. *Herald Co.,* 390 U.S. 145, 170 n.3 (1968) (*Stewart, J., dissenting*).

III. *Application of Section 1 to this case.*

What we must do in this case is determine whether or not the trial court was correct in holding the bylaw to be a per se violation of Section 1 of the Sherman Act, or whether the bylaw should be tested at trial under the "rule of reason" enunciated in *Standard Oil Co.* v. *United States, supra,* 221 U.S. 1.

Before proceeding with this analysis it is important to summarize what the challenged bylaws do and do not do for the purpose of determining whether the motion for summary judgment should have been granted.

1. The NBI bylaws do prohibit its card issuing banks from being members of any other national credit card organization as either an issuing or an agent bank; and they likewise prohibit NBI's agent banks from being card issuing banks of MC. If enforced the bylaw would exclude Worthen from being a card issuing bank of both NBI and MC and it would have

to choose between the two or become an agent or noncard issuing bank of both.

2. The NBI bylaws do not:

   a. allocate or assign exclusive territories to the member banks or restrict its membership in a way to limit competition on a geographic basis.

   b. attempt to fix the charges made for interest to the cardholders, the discounts charged the merchants or the interchange fee charged between issuing and agent banks.
   [In other words the elements of price control and exclusive territorial assignments are not present in this case.]

3. For the purpose of summary judgment Worthen has conceded that there is competition between the two national bank card systems which would be substantially lessened in absence of the bylaw, and there would be an eventual merger of the two systems if the bylaw is not enforced.

As indicated by the Department of Justice in its amicus brief:

> "The question on appeal is whether the district court correctly held that by-law 2.16 is illegal *per se* under Section 1 of the Sherman Act. More precisely the question is whether it is illegal *per se* for a group of banks which are combined in a system to produce a product (or service) that individually none of them is able to produce, but which they sell in competition with each other, to exclude from proprietary membership in their group a bank which is participating in another such system."

In *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), the Supreme Court was faced with the propriety of granting summary judgment in a case involving franchising

contracts between White and its dealer containing territorial sales restrictions. This was the first case to come before the Court involving vertically imposed territorial restrictions and it held that a "per se" determination should not have been made stating as follows:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and within the 'rule of reason.' We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' and therefore should be classified as *per se* violations of the Sherman Act." *Id.* at 263. (Citations omitted.)

The Antitrust Division of the Department of Justice has urged that this same reasoning should apply here:

> "In this case the district court was faced with a novel and difficult issue of antitrust law. Its opinion reflects thoughtful and responsible consideration of that issue. Nevertheless, the very novelty and complexity of the questions indicate that they should have been resolved only after a full trial. Such a trial may establish that the result reached by the district court is correct, and that the restraints imposed by By-Law 2.16 are not only more restrictive than necessary to achieve any legitimate purpose, but are, in addition, so harmful as to be illegal *per se*. On the other hand, a full record may show that the by-law is not only reasonable, but that it preserves competition between the several bank credit card systems."

We agree with that reasoning.

Worthen argues that the Supreme Court in *White* merely

"wanted to know more about the competitive consequences of territorial and customer restrictions vertically imposed. It had never before held that such vertical restraints were *per se* illegal in any industry context." However our reading of *White* satisfies us that the novelty and importance of the question was the determining factor in applying the rule of reason rather than the fact that a vertical rather than a horizontal restraint was imposed.

Worthen further argues that the enforcement of the by-law was properly held to be a per se violation, relying upon, among others, the following Supreme Court decisions: *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Fashion Originator's Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914); *United States* v. *Nationwide Trailer Rental Systems, Inc.*, 156 F.Supp. 800 (D. Kan.), *aff'd per curiam*, 355 U.S. 10 (1957). Our reading of those cases does not permit us to reach the same conclusion.

These cases fall into three general categories. The first category may be referred to as group boycott cases. In *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914), a combination of retail lumber dealers blacklisted wholesalers who sold directly to the retailers' customers. In *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959), a large appliance dealer used its purchasing power to influence manufacturers and wholesalers to sell merchandise at discriminatory prices to a competing appliance dealer. In *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457 (1941), a group of dress designers banded together and

refused to sell their designs to stores which sold copies of their dresses. In these cases, and others, the Supreme Court attached the "group boycott" label and held the activities of the group to be per se violative of the Sherman Act. In each of these cases there was a lack of an economic justification, in terms of the need to join together to produce the product being sold. In this case, as conceded by Worthen, it would be impossible for any of the member banks, acting alone, to issue a national bank credit card. It can only be done by a nationwide combination of banks. The facts that in this case there *is* an economic justification for the existence of NBI in terms of productive capacity, and inferentially a justification for preserving the integrity of that productive capacity, together with the fact that in the cited cases there was a lack of any redeeming virtue,[6] leads us to the conclusion that these cases are not controlling here. *See,* Note, *Concerted Refusals to Deal under the Federal Antitrust Laws, supra,* 71 Hav.L.Rev. at 1536-1541.

The second line of cases suggested by Worthen are territorial restrictions or price restraint cases. *United States* v. *Topco Associates, Inc., supra,* 405 U.S. at 596, involved a cooperative association of small and medium sized supermarket chains. Each chain was run independently and no grocery business was conducted under the Topco name. Topco's function was to serve as a purchasing agent, procuring and distributing food and related nonfood items, most of which were sold under a brand name owned by the association. This program allowed each member to save costs, thus enhancing the competitive position of the mem-

[6] Per se violations include those " 'agreements or practices which because of their pernicious effect on competition *and lack of any redeeming virtue are* conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' " *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 5 (1958) *quoted* in *White Motor Co.* v. *United States, supra,* 372 U.S. at 262. (Emphasis supplied.)

ber with respect to large competitors. Each member of Topco was allocated an exclusive area in which to sell the Topco product. The procedure for approval of new members gave existing members a "veto of sorts" over actual or potential competitors in the area. Topco also prohibited the resale of goods at wholesale prices. Applying the rule of reason the district court upheld these restrictions. However, the Supreme Court struck down the territorial allocation system and the other restrictions as per se violations of the Sherman Act. The Court did this in the face of Topco's arguments that without exclusive territorial allocations no member would have the incentive to advertise the Topco brand, and that without this device such chains as A & P would be able to establish a monopoly position in the market.

We first note that even under the rule of reason analysis suggested by Topco that its claim was open to serious question.[7] *See Supreme Court Review, 1971 Term,* 86 Harv.L. Rev. 1,245 (1972). But in any event, it is clear that the essential restraint in the *Topco* case involved an agreement between members not to compete with each other and to refuse to sell at wholesale. On this record, these conclusions can not be drawn in this case.

United States v. Sealy, Inc., 388 U.S. 350 (1967), was the touchstone for the *Topco* decision. Sealy was the owner of a trademark for Sealy brand mattresses. It licensed manufacturers in various parts of the country to produce

[7] As Chief Justice Burger noted in his dissent, *United States* v. *Topco Associates, Inc., supra,* 405 U.S. at 614, the Topco arrangement provided its members with certain economies which they could not otherwise achieve except by association. But we agree with the Justice Department that "[T]he 'product' represented by a national credit card requires cooperative relationships among the member banks of a kind not encountered in the sale of products by individual supermarket chains." *Indeed in this case association is required before the "product" can exist.*

and sell the Sealy trademarked mattresses and allocated territories for each licensee. Sealy agreed with each licensee not to license anyone else to manufacture or sell the Sealy product in a designated area and the licensee agreed not to manufacture or sell the Sealy product outside the area. The licensees owned most of the Sealy stock and controlled the day to day activities of Sealy. Sealy was charged with consiparcy to allocate territories and to fix prices. The district court enjoined the price fixing provisions, but upheld the territorial allocation system. The Court reversed, holding that since Sealy was owned by its licensees the territorial allocation system was a horizontal restraint of trade and therefore the system was a per se violation of Section 1. *Sealy,* like *Topco,* presented agreements among members not to compete with each other, and no independent economic justification for the group could be found since the individual members were obviously able to produce the product absent the association.

Here, we do not feel that the *Topco* and *Sealy* cases are controlling since completely different types of restraints were present in those cases involving exclusive territorial assignments and price restraints, and since the association of the members was not required by industry structure in terms of the ability to produce the product as is the case here.

We turn finally to the last line of cases relied upon by Worthen. *Associated Press v. United States,* 326 U.S. 1 (1945), involved the legality of the bylaws of the Associated Press which placed restrictions on the admission to membership of applicants serving the same area as any existing member, and other bylaws forbidding A.P. members to sell local news to nonmembers. The Court, in group boycott language, struck down the bylaws of A.P. which restricted membership solely because the applicant was a competitor

of an existing member. With regard to the other bylaw, however, forbidding A.P. members to sell local news to nonmembers, an excellent example of a concerted refusal to deal, the Supreme Court did not strike down that prohibition. *Id.* at 21-22. *See also* Bird, *Sherman Act Limitations on Noncommercial Refusals to Deal,* 1970 DukeL.J. 247, 289-290 & n. 168 (1970); Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason,* 66 Col.L. Rec. 1487, 1502 (1966); Barber, *Refusals to Deal Under Federal Antitrust Law, supra,* 103 U.Pa.L.Rev. at 878-879.

As a consequence we must conclude that *Associated Press* does not mandate the application of the per se principle in this case. Unlike the *Associated Press* case this record does not present any indication that restrictions on membership are imposed to enable member banks to be free from competition from other competing banks. In fact it appears that competing banks in the same city are admitted to membership in NBI. The bylaw in question here is most similar to the restriction in *Associated Press* preventing the sale of local news to nonmembers, and, as we have discussed, this restriction was not held to be per se unlawful standing alone.

Another case relied upon by Worthen is perhaps the closest on point yet the least illuminating. *United States* v. *Nationwide Trailer Rental Systems, Inc.,* 156 F.Supp. 800 (D. Kans.), *aff'd per curiam,* 355 U. S. 10 (1957). *Nationwide Trailer* involved a membership corporation designed to provide a network of stations from which trailers could be rented and to which they could be returned after use. At issue were price fixing provisions, territorial allocation provisions, and a provision preventing a member from being connected with a competitive trailer system. The district court enjoined these provisions.

While we believe that the *Nationwide Trailer* case has obvious similarities to this one, two factors suggest that reliance would be misplaced. First, the *Nationwide Trailer* opinion like many of the others relied upon by Worthen, involved an aggregate of trade restraints; that is, not only was the dual membership provision at issue, but price fixing and territorial allocations were also involved. Perhaps more importantly, the opinion is based upon a bare set of findings of fact and conclusions of law, thus the legal reasoning for enjoining the provision preventing dual membership is not clear.

In this case, because of the abbreviated record consisting primarily of affidavits and admissions, we do not know exactly how NBI competes with MC on a system level or how the individual member banks compete with each other. There is not a sufficient basis in the record to determine how the proposed rule would affect competition between NBI and MC, if indeed, there is direct competition between the two;[8] or how it would affect competition between member banks in the same geographical area; or how it would affect the overall interest cost to the credit card holders and the discount cost to the merchants from which the banks purchase the paper. There is some indication that dual representation of both NBI and MC would result in the pirating of technological information relating to instantaneous computer verification of credit cards but there is no showing exactly how this might affect NBI and MC or its members.[9] The admission, for the purposes of ruling

[8] It should be noted that the determination of whether there is competition between NBI and MC does not depend upon actual revenue competition between them. Competition may be shown by proving an overall increase in the profit making ability of their members.

[9] Of special significance in this respect would be evidence as to how the development of these new technological procedures would permit better and cheaper service to the card holders and the merchants or otherwise enhance competition between the systems and their member banks.

on the motion for summary judgment, that the enforcement of the rule would result in an eventual merger of NBI and MC is of little use since such a merger would in itself possibly constitute a violation of the antitrust laws; and the admission that there is competition between the systems which will be diminished if the rule is not enforced may or may not be correct.

The bank card industry is a relatively new one and, with over eight billion dollars in annual business, a very large and important segment of our economy. Considering the importance of the industry and the lack of definitive information relating to competition therein, it would be a mistake to determine this case of first impression on a per se basis. This is especially true where it may result in the dilution of competition or the elimination of one of the two competitors, where this is not an aggregate of illegal restraints such as price fixing or exclusive territorial allocations and where the initial purpose in forming the joint venture, to produce a national credit card, is obviously not illegal.

There is an additional reason that this case should be tried on its merits. If it is shown during the trial that some restriction on dual membership is permissible, the trial court must determine in its decree whether or not the bylaw as drafted goes too far. Possibly the ban against an agent bank of NBI acting as an issuing bank of any other group, (and visa versa) goes further than it needs to go to accomplish its legitimate purposes; and possibly the extension of this ban to membership in new national credit card systems is neither necessary nor proper.[10]

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[10] The question is whether the means used by NBI to protect its productive capacity goes further than necessary in restricting the free choice of its members. *Cf. Silver* v. *New York Stock Exchange*, 373 U.S. 341, 361-366 (1963); Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws, supra*, 71 Harv.L.Rev. at 1537.

These are all matters for the trial court to consider in determining first whether any restriction should be permitted and secondly the extent of that restriction.[11] The summary judgment is hereby reversed and the case is remanded for trial.

A true copy.
Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

[11] It is incumbent upon plaintiff to prove the effect of the rule on interbank competition, and especially the effect on interest rates on deferred payments charged the cardholder, the discount rates charged the merchants and spill over business. If plaintiff proves that the bylaw restrains interbank competition then NBI must prove that competition does exist between the systems and the effect of the bylaw thereon with emphasis on the possible reduction of incentive in advancing technological innovations, on resulting interest costs to the cardholders and discount rates to the merchants. NBI must also submit proof as to the necessity of maintaining the bylaw in its present form rather than a more limited version thereof.

WORTHEN BANK & TRUST COMPANY,
Plaintiff,

vs.

NATIONAL BANKAMERICARD INCORPORATED,
Defendant.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

HONORABLE JOHN E. MILLER, JUDGE

OPINION OF THE DISTRICT COURT

APPENDIX A

OPINION OF THE DISTRICT COURT

This action comes before the court on a motion for a partial summary judgment by the plaintiff, Worthen Bank & Trust Company (Worthen). The complaint, filed on November 26, 1971, alleges that the conduct of the defendant, National BankAmericard Incorporated (NBI), violates Sections 1 and 2 of the Sherman Antitrust Act, and asks for (a) a declaratory judgment that the defendant has violated Sections 1 and 2 of the Sherman Act, (b) injunctive relief against continuing or threatening violations of said laws, and (c) damages for the violations of said laws. Specifically Worthen charges that, as a Class A member of NBI, it is restricted by a by-law of said corporation from handling any other national bank credit card.

Included in the complaint are allegations that raise the question whether the case should be prosecuted as a class

action. This question has been considered and determined in a separate opinion filed along with this opinion.

The defendant has answered the allegations of the plaintiff and denied that it has violated the Sherman Antitrust Act in any way, or that Worthen is entitled to injunctive relief or damages.

The court has jurisdiction of the parties and the subject matter under 15 U.S.C.A. § 1526.

Worthen is a corporation duly organized and existing under the banking laws of the State of Arkansas, with its office and principal place of business in Little Rock. It is a subsidiary of First Arkansas Bank Stock Corporation, a bank holding company, which also owns the Stephens Bank of Stephens, Arkansas, and the First National Bank of Hot Springs, Arkansas.

The defendant, National BankAmericard Incorporated (NBI), is a for-profit membership corporation which produces and provides a distinctive product and service: A national general purpose bank card and service under the registered marks "BankAmericard" and the "Blue, White and Gold Bands Design." The members of NBI are banks which have banded together to provide this national bank card product and service.

Prior to 1970 Worthen had been involved in the growing bank credit-card business for a number of years. In May of 1970 Worthen became a Class A, or proprietary member of NBI. On November 10, 1970, Worthen submitted an application for full membership, or proprietary membership, in the Interbank Card Association, which operates the Master Charge card system. At that time NBI had no by-law prohibiting one of its Class A members from being a part of any other national bank credit-card system. On

April 5, 1971, Worthen's application to Interbank was approved, and Worthen began to negotiate merchant agreements for acceptance of Master Charge cards.

It is necessary to digress at this point into a brief summary of how a national bank credit-card system works. There are several relationships involved in the average bank credit-card transaction. There are only two national bank credit-card operations, NBI and Interbank. In both the Master Charge and BankAmericard systems there are two types of member banks. A Class A member in NBI and a full member in Interbank have the responsibility for the issuance of cards, the collection of accounts, and the operation of the interchange system, along with the Class B or associate member banks, which function merely as agent or merchant banks hold the merchants' sales slips and forwarding them to the full member or Class A bank. Banks benefit from promoting the credit cards by collection of a service charge for handling the sales paper, increased deposits from merchants who want to deposit their sales slips in the same bank where they have an account, and to a certain extent from interest on card-holder accounts which are not paid within thirty days of receipt of a statement for the same. By the end of 1971 there were aproximately 9,500 banks participating in national bank credit-card programs with approximately eight billion dollars in volume. Interbank (Master Charge) is the larger of the two systems.

A typical transaction can be described as follows: A BankAmericard holder in Little Rock, Ark., using a card issued by Worthen through one of its agent or merchant banks in another city in Arkansas travels to Dallas, Texas, where he wishes to purchase a $25 item in a store which accepts BankAmericard. After the sale the merchant takes the sales slip to a bank in Dallas which is a Class A or full member bank in the NBI system and holds a merchant

agreement with the retailer. This bank pays the merchant for the sales slip, less a discount, and returns the sales slip to Worthen in Little Rock for collection from the cardholder. The Dallas bank is paid an interchange fee for handling the sales slip. This is a very simple bank credit card transaction, but it gives a general idea of how the system works.

The crux of the complaint of Worthen is that by-laws 2.15 and 2.16 of NBI violate Section 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1. As previously stated, Worthen applied for a full membership in Interbank (Master Charge) in the middle of the year 1970. NBI immediately expressed its disapproval of this action, and began an effort to determine what it could do about dual memberships in the national bank credit card systems. The end result of all NBI's activities are reflected in the aforementioned by-laws approved on September 24, 1971, which read as follows:

> "Section 2.15. Confidentiality. No member shall publish, disclose, convey or distribute to any person or organization, including, but not limited to, any parents, subsidiaries or affiliates, any confidential or proprietary matters of the corporation, including, but not limited to, documents, ideas, products and data, without the prior written consent of the corporation, except (a) to a person or organization which (i) is rendering services to such member with respect to its BankAmericard program and to the extent that such disclosure is necessary to properly perform such services, (ii) does not compete with the corporation or its members with respect to the BankAmericard program, and (iii) agrees to hold such maters in confidence; and (b) such matters that have been publicly released by the corporation.
>
> "Section 2.16. Requirements with Respect to other Credit Cards.
>
> (a) No Class A member shall directly or indirectly (i) own, (ii) issue, (iii) assist in the issuance of, (iv) service, (v) honor, or (vi) enter into

contractual relationships with persons for the issuance of, or with merchants to honor, any Credit Cards except (1) as permitted pursuant to sections 2.04 and 2.05, (2) Area Credit Cards, and (3) Credit Cards owned or issued by any organization licensed to conduct the Bank-Americard program in a foreign country.

(b) No Class A member shall directly or indirectly accept for deposit or purchase any instruments arising from the use of any Credit Cards except those arising from (i) Credit Cards issued pursuant to sections 2.04 and 2.05, (ii) Area Credit Cards, and (iii) Credit Cards owned or issued by any organization licensed to conduct the BankAmericard program in a foreign country.

(c) No Class B member shall directly or indirectly (i) enter into contractual relationships with persons for the issuance of Credit Cards, except as may be permitted by section 2.05 or (ii) own or issue in its own name Credit Cards, or (iii) appear on Credit Cards or elsewhere as the owner or issuer thereof, except Area Credit Cards.

(d) If a parent, subsidiary or affiliate of a member takes any action which the member may not take under the provisions of this section, such member shall be deemed thereby to have violated this section unless, in the case of affiliates, (i) there are no common officers or employees engaged in the management or operation of both BankAmericard and other Credit Card programs and (ii) the operations — including, without limitation, marketing, authorization, credit, collection and solicitation — of such programs are separate; provided that paragraph (c) shall not apply to parents, subsidiaries and affiliates which are Class A members. The provisions of section 2.15 shall apply, without limi-

tation, to all officers and employees engaged in the operation of a member's Credit Card program and to all directors of members.

(e) The provisions of this section shall not apply during periods necessary to (i) convert a credit card program to or from the BankAmericard program or (ii) make an adjustment to a Credit Card program as required for compliance with this section, provided such conversion or adjustment is completed in accordance with such conditions and in such time as the corporation may require, which time shall not exceed twelve months from (1) the effective date of this section, (2) the date of acceptance of membership, (3) the date of delivery of notice of termination, or (4) the date of any future acquisition, merger or other circumstances which necessitates an adjustment hereunder, as the case may be.

(f) 'Credit Cards' as used in this section mean any instruments, whether in the form of a card, book, plate, coupon, or other credit device owned or issued by a bank (including any of its parents, subsidiaries or affiliates) which may be used to obtain money or to purchase or lease property or services on credit but do not include letters of credit or any such instruments usable exclusively for the obtaining of money from such bank or the guaranteeing of checks.

(g) 'Area Credit Cards' as used in this section mean any Credit Cards that are owned, issued, serviced, and honored exclusively by one bank and honored by merchants having a direct contractual relationship with such bank, except that such bank may appoint any other bank as its agent with respect to the Area Credit Card program for the sole purpose of accepting for deposit sales drafts from such merchants arising from the use of such Area Credit Cards."

Since July of 1971 Worthen has been involved in a campaign to sign up merchants and associate banks in the Interbank system. Worthen has not begun to issue Master Charge cards or handle merchant agreements at this time because of a stipulation entered into in this action.

Both the plaintiff and the defendant have participated in extensive discovery. Much of the information obtained is subject to an agreed protective order entered into by the parties on or about April 7, 1972, which protects certain sensitive statistical information and business records.

On April 10, 1972, the plaintiff filed a motion for partial summary judgment, memorandum in support thereof and memorandum in support of maintenance of this action as a class action. In its motion for partial summary judgment Worthen moved the court as follows:

> "1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a partial summary judgment declaring Section 2.16 of the by-laws of defendant, National BankAmericard Incorporated, to be in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1), and permanently enjoining the enforcement of the same by defendant on the ground that there is no genuine issue as to any material fact relevant to legality of the by-law and that plaintiff is entitled to judgment as a matter of law on the issue of liability alone.
>
> "2. This motion is based upon the pleadings, depositions, answers to interrogatories, and exhibits contained in the Appendix in support of plaintiff's Motion for Partial Summary Judgment filed herewith."

In some quarters doubts have been expressed as to whether Rule 56 is applicable in the consideration of suits based upon an alleged violation of the antitrust laws.

Rule 56(c), Fed.R.Civ.P., provides:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

In *White Motor Company* v. *United States,* (1963) 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738, the court at page 700 of 83 S.Ct. said:

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458, they are not appropriate 'where motive and intent play leading roles.' Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial."

In *Poller* v. *Columbia Broadcasting System,* (1962) 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458, the court at page 488 of 82 S.Ct. said:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed.Rules Civ.Proc., 28 U.S.C.A. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule

is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944)."

In *Sartor* v. *Arkansas Natural Gas Corp.*, (1944) 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967, the court at page 728 of 64 S.Ct. said:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. *American Insurance Co.* v. *Gentile Brothers Co.*, 109 F.2d 732; *Whitaker* v. *Coleman*, 115 F.2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

Citizens Publishing Company v. *United States*, (1969) 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148, was a case in which the Government's complaint charged an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C.A. § 1, and a monopoly violation of Section 2, 15 U.S.C.A. § 2. The District Court finding that the joint operating agreement provisions which were unlawful per se under Section 1 granted the Government's motion for summary judgment.

The case was before the Supreme Court on appeal, and at page 135 of 394 U.S. the court said:

> "We affirm the judgment. The Section 1 violations are plain beyond peradventure."

In the consideration of a motion for summary judgment, the first question that must be determined is whether the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, present any genuine issue as to any material fact. If no such issue is presented by the examination of the record, the court then considers whether under the applicable law the moving party is entitled to a judgment as a matter of law.

In *Giordano* v. *Lee,* (8 Cir. 1970) 434 F.2d 1227, 1231, the court quoted from Poller, supra, and held:

> "• • • that any inferences to be drawn from the underlying facts contained in the materials presented must be viewed in the light most favorable to the party opposing the motion for summary judgment. [Citations omitted.] Any doubt as to whether there is an issue of material fact for trial should be resolved against the moving party."

In *Adickes* v. *Kress & Co.,* (1970) 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142, the court held that the materials relied upon did not establish the absence of a genuine issue of fact notwithstanding the failure of the appellant to come forward with an affidavit properly asserting the presence of the policeman in the street if she were to rely upon that fact, and approved the statement found in 6 Moore's Federal Practice, 2d Ed., ¶ 56.22[2], pp. 2824-25:

> "It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit. And the peril rightly continues [after the amendment to Rule 56(e)]. Yet the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required."

A full consideration of the material relied upon by the movant and the contentions of the parties as set forth in their briefs submitted to the court and the oral argument convinces the court that there is no genuine issue as to any material fact. Therefore, the only question before the court is whether the movant is entitled to a judgment as a matter of law.

Defendant submitted its answer breif in opposition to the plaintiff's motion to the court on June 2, 1972, and a reply brief was filed by the plaintiff on June 14, 1972. On June 20, 1972, extensive oral arguments were heard by the court.

The following contentions were made before the court by the respective parties in their briefs and arguments in support of and in opposition to the motion.

Worthen argued that the actions of NBI in adopting by-laws 2.15 and 2.16 constitute a horizontal group boycott, which is a per-se violation of Section 1 of the Act. It was the opinion of Worthen that there are three levels of competition in the bank credit card business: The first is competition among banks for new cardholder accounts; the second is competition between banks to set a lower discount in buying sales slips from merchants; and the third is between the individual banks which are full members in the credit card system in developing agency relationships with other banks.

Worthen pointed out the remarkable growth of the national bank card systems and the effect it has had on consumer and commercial dealings in the last few years. Worthen argued that the competition as set out above is basically between individual banks and not between the bank credit card systems. Worthen conceded there is some competition between the systems in areas of improvement of authorization and interchange facilities and dissemina-

tion of innovations and general know-how. It was pointed out that there are no geographical limits or exclusive dealers in the bank credit business.

In its brief Worthen stated that regardless of whether NBI is a joint venture, partnership, trade association, or management corporation, that it does constitute a combination of competing banks which control and operate NBI, and that this in turn constitutes joint activity among competitors. In the oral argument it was agreed by both parties that NBI could be characterized as a joint venture among the member banks. It was Worthen's contention that NBI constitutes a combination of competitors and that its actions in passing the by-laws restrain trade and commerce. It asserted that under the by-laws a bank can be an agent bank in both systems at the same time. Worthen stated that even NBI realizes that the bank which has both Master Charge and BankAmericard has a "competitive edge" over a bank which handles only one credit card. Worthen asserted that the benefits to a bank from handling a credit card system are numerous. A bank benefits in (1) making a profit from the merchant discount, (2) any interest earned on a cardholder's account, and (3) indirect banking business generated by attracting new customers, i.e., cardholders and merchants. Thus, Worthen claimed the bank credit card is an effective competitive tool used to attract customers, and the actions limiting Class A members of NBI from handling any other credit card restrains competition.

Worthen further contended that any justification claimed by NBI would not be relevant to a finding that the by-law itself constitutes a per-se violation of Section 1 of the Act, and stated that the by-laws rather than preserve competition preserve a duopoly. Worthen is saying that the by-law preserves the present two systems, BankAmericard and

Master Charge, and precludes the establishment of any other system because a Class A member of NBI would have to entirely disassociate itself with NBI before it could join any new national bank credit card system. Worthen further stated that it is up to Congress how to promote competition, not individual industry. Worthen contended that by-law 2.16 isolates NBI from competition from members of Interbank in the efforts of the national bank credit card systems to sign up member banks.

Worthen cited *United States* v. *Sealy, Inc.,* (1967) 388 U.S. 350, 87 S.Ct. 1842, 18 L.Ed.2d 1238, and *Serta Associates Inc.* v. *United States,* (1969) 393 U.S. 534, 89 S.Ct. 870, 21 L.Ed.2d 753, for the proposition that the form of organization of NBI is insignificant to any determination to be made by this court. Worthen stated the Sealy case shows an organization very similar to that of NBI and in that case the court held that price fixing in positions imposed by Sealy were the product of a combination of competitors' efforts to restrain trade. Worthen also cited the case of *Associated Press* v. *United States,* (1945) 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed.2d 2013, as a model to follow in determining whether or not actions by a combination of competitors constitute a per-se violation of Section 1 of the Sherman Act. In that case the U.S. Supreme Court affirmed a Special Court decision, in which Judge Learned Hand of the Second Circuit carefully explained the facts and circumstances of the case before the court, and then proceeded to find a per-se violation of the Act in an instance where the Associated Press members were allowed a veto when a nonmember who filed an application for membership operated a newspaper in the circulation area of the members. The other principal case relied upon by Worthen is *United States* v. *Topco Associates, Inc.,* (1972) 405 U.S. 596, ... S.Ct. ....., ... L.Ed.2d ..... Worthen interpreted this case as demonstrative of the fact that the court should

not look beyond the pertinent facts which assisted in a determination of whether or not the actions of NBI constitute a horizontal agreement among competitors to restrain trade. According to Worthen, Topco also stands for the principle that industry is not the proper party to enforce antitrust laws.

In its oral argument Worthen reemphasized the points made in its brief, and specifically stated that there are only two questions before the court: (1) Does by-law 2.16 restrain trade, and (2) does the by-law constitute a horizontal action among competitors to restrain trade. Worthen further alleged that since there were no disputed material facts before the court, only questions of law, that summary judgment would be proper.

In June 1972 the court received NBI's brief in opposition to the motion of Worthen. NBI first emphasized that the by-law section 2.16 does not prohibit Worthen from handling both BankAmericard and Master Charge credit cards. NBI stated that under the present by-law Worthen can become a Class B member of NBI and handle Master Charge as an associate member. NBI emphasized that the national bank credit card systems are unique. According to NBI the product it produces, BankAmericard, is of the nature that it cannot be produced by any single member bank. NBI feels that the BankAmericard is created in small parts by each member bank.

It is NBI's contention that if banks were allowed to be proprietary members in both systems, that there would be no incentive to maintain both systems and that eventually a merger would take place and only the larger of the two systems, Interbank, would remain. It was further argued by NBI that by-laws 2.15 and 2.16 are the only reasonable alternative to prevent this merger from taking place. NBI denied that it is a horizontal combination of competitors

since none of the individual banks are capable of producing the product and service provided by NBI.

NBI maintained that bank-to-bank competition does exist within the system, but that there must be competition between the systems themselves for national bank credit card systems to continue to progress and develop. According to NBI, if the two systems merge, there would certainly be antitrust problems present. NBI contended that the purpose of Worthen in acquiring a proprietary membership in both systems is to create a monopoly in the Little Rock area and participate in certain price-fixing activities in violation of sections of the Sherman and Clayton Acts. As an example of this type action, NBI cited *Citizens Publishing Company v. United States,* (1969) 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed. 2d 148. NBI asserted that this is especially true since Worthen is the dominant bank in the Little Rock area, and contended that it has an affirmative duty to prevent any unlawful merger and/or restraint of trade which would be brought about by Worthen's actions in obtaining a proprietary membership in both systems.

Incidentally NBI pointed out less significant problems which it felt would develop if one bank held a proprietary membership in both systems. According to NBI it is the duty of its Class A members to contribute knowledge they obtain about certain technical and practical advancements which they discover or come in contact with in handling bank credit card transactions. It was further contended that the by-laws of Interbank would require a member of that system not to discriminate against its system in the handling of another national bank credit card. (The Interbank by-laws contain no prohibition against dual membership.) From NBI's point of view there is no practical way in which a bank could be a proprietary member in both systems and

follow the rules of the systems, even if by-law 2.16 was not present.

In conclusion, NBI stated that there are specific issues of fact which make summary judgment improper in this case. NBI contended that the nature of the two competing bank card systems is a material fact and that there is a disagreement between Worthen and NBI as to the nature of NBI. In the alternative, NBI stated that if a summary judgment is granted that the court certify the case for interlocutory appeal.

In its oral argument NBI reemphasized certain points in its brief, the main thrust being that the by-law was not designed to lessen competition but to increase it, and that if Worthen is allowed to hold a proprietary interest in both systems, other banks would do the same thing and the result would be a merger of the NBI and Interbank systems which, in NBI's opinion, is a possible violation of the Clayton and Sherman Acts.

A reply brief was filed by Worthen on June 13, in which it stated that many of the arguments made by NBI are not relevant to a decision on the issue of whether or not there is present a per-se violation of the Sherman Act. Worthen also stated in reply to the argument of NBI that the national bank credit card systems are a unique and different business that should not be subject to accepted principles of antitrust law, that NBI, in reality, fits within the exact situation that Sealy-Serta-Associated Press and Topco fit.

The material undisputed facts as found by the court are hereinafter stated.

Worthen is a Class A member of NBI and a full member of Interbank. By-law 2.16 of NBI prohibits a Class A member of NBI from joining Interbank.

Interbank has no provision in its by-laws which prevents any member of that system from joining the system of any other national bank credit card. The NBI by-law forecloses the possibility of development of another national bank card system by any member of NBI, but certainly not within the Interbank system where a member is allowed to participate in another national bank card system. There is competition in the bank credit card business between the individual member banks of the systems on the merchant and cardholder level and between the systems themselves in association of member banks. There are no territorial limits or exclusive dealers within the bank credit card business. NBI can best be described as a joint venture among member banks which produces an identifiable product, BankAmericard. BankAmericard can only function through its member banks and the card could not operate without a central organizational unit, NBI, or member banks, Worthen. The bank which can issue bank credit cards holds a distinct advantage over other competing banks in the area. A bank that is a member in either of the systems will benefit from increased use of banking services by customers. A bank which could become a Class A or full member in both NBI and Interbank would have a competitive edge on other banks in the area. The present structure of the bank credit card business with respect to member bank responsibilities will to some extent be changed if banks could become full or Class A members in both Interbank and NBI at the same time. The bank credit card business is growing at a phenomenal rate and it has certain problems unique to its particular business operation.

APPLICABLE LAW

The motion for partial summary judgment of plaintiff is based upon 15 U.S.C.A. § 1, which reads in part, as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *."

There are two principal questions before the court: (1) Does the imposition of by-law 2.16 by NBI constitute an agreement in restraint of trade or commerce; and (2) does this action by NBI constitute a horizontal restraint of trade or commerce.

On the first question, the court has examined decisions of other courts to determine the effect of the action by NBI. These decisions are of limited value because each potential antitrust violation must be examined in light of its particular effect on commerce. There is no doubt that NBI considered the possibility that imposition of by-law 2.16 was in fact a restraint of trade to some extent. This is reflected by the exhibits of the plaintiff to its motion for partial summary judgment, which consists of correspondence between various corporate executives in NBI prior to the passage of by-law 2.16. This in and of itself is not sufficient grounds to find that NBI's action is a restraint of trade.

First, the court must decide what is a restraint of trade or commerce. The most recent pronouncement of the court is found in *United States* v. *Topco Associates, supra*, where the court at page 606 of 405 U.S. said:

> "On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is 'in restraint of trade.' Theoretically, all manufacturers, distributors, merchants, sellers and buyers could be considered as potential competitors of each others. Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.). The history underlying

> the formulation of the antitrust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of § 1, the Court adopted a 'rule of reason' analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act. Standard Oil Co. v. United States, 221 U.S. 1 (1911). An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. Chicago Board of Trade v. United States, supra, at 238."

As held by the Supreme Court, any contract between competitors can be construed as a restraint of trade of some type. It is for the court to decide whether this particular action by NBI is within the scope of Section 1 of the Sherman Act. The action by NBI has numerous effects on Class A member banks of that system. It restricts the banks to one national bank credit card. This restricts a bank from offering its customers, as cardholders and merchants, services under the Master Charge card name. It is not disputed by the parties that the only national bank credit cards currently existing are BankAmericard and Master Charge. A further imposition upon a Class A member of NBI appears in the by-law in that any subsidiary bank is also prohibited from joining the Interbank system. A competitor in the Little Rock area, Union National Bank, is a member of both systems as an agent bank and Worthen has lost some merchant customers to Union National Bank because it is more convenient for the merchants to deposit all of their sales slips in one bank for payment. One of Worthen's motives in applying for Master Charge was to

better serve its cardholder customers who often travel in areas where BankAmericard is not as readily acceptable as Master Charge. Also, Worthen desires to provide certain agent banks in resort areas in the State with facilities for handling Master Charge because many tourists in this area are Master Charge cardholders. The fact that a bank handles a national bank credit card, be it Master Charge or BankAmericard, clearly gives that bank an advantage over a competitor bank. The ability to handle both cards as a full or Class A member in each system gives a bank a greatly enhanced competitive position. In light of these circumstances the court finds that by-law 2.16 constitutes a restraint of trade and commerce.

There are two types of restraints: (a) one which would be regarded as so inherently anticompetitive that it would be struck down without considerations of the underlying motives, purposes or effects, i.e., restraints that are illegal per se; (b) one that may have a tendency to suppress competition or operate to result in a restraint of trade but may also have certain redeeming features which may, under appropriate circumstances, save it from condemnation under Section 1 of the Sherman Act, i.e., restraints judged by the rule of reason.

The more difficult part to decide is whether or not this restraint is the result of action by competing member banks or simply a unilateral action by NBI. It is the opinion of this court that NBI is the combination of the Class A member banks and that any action taken by NBI is based upon the action or lack of action by these Class A members. The fact that NBI "produces" BankAmericard is not particularly relevant since NBI needs each member bank to produce BankAmericard. The case of United States v. Sealy Inc., supra, is particularly helpful in this aspect. Sealy is a price fixing case, and from that standpoint is

of no importance in this case. The value of Sealy is that Sealy was a corporation consisting of approximately 30 "licensees" who owned substantially all of the its stock, controlled and managed its general business and produced in different areas throughout the country the Sealy mattress. The Sealy mattress, though produced individually by each licensee, was competitive with other companies because the organization produced a nationally known product. The use of the Sealy name was the principal asset of the Sealy Corporation. Each company could produce mattresses.

Worthen is capable of producing a bank credit card. It did so for many years prior to joining the NBI system. Worthen, through NBI, can now produce the BankAmericard which is accepted by merchants throughout the country who have agreements with other member banks, and process sales slips on merchandise purchased by cardholders who have received their bank credit cards thorugh other banks. In this aspect NBI's principal asset is the BankAmericard name and production of a uniform product with the help of Worthen and other member banks. The nature of NBI and the nature of Sealy are almost identical, and the Supreme Court at page 353 of 388 U.S. held "that Sealy was a joint venture of, by and for its stockholder licensees." NBI is likewise a joint venture composed of the member banks, and any action by NBI constitutes an action on behalf of and by these member banks.

It was admitted from the inception of this case that there was competition between the member banks in signing up merchants and cardholders. Therefore, the member banks of NBI are competitors, and any action by NBI must be considered as an agreement between competitors. It is quite clear that the action of NBI restrains trade, but the court must decide whether the restraint is in fact unlawful.

This brings the court to the second principal question and the question raised by plaintiff's motion for partial summary judgment: Does NBI's action constitute a horizontal restraint on trade or commerce.

Horizontal restraints on the market are considered per-se violations of Section 1 of the Sherman Act. Horizontal restraints include agreements to fix or control prices, agreements to control or limit production, exclusive sale or purchase agreements, group boycotts, and restrictive covenants (i.e., such as one not to compete with another). Vertical restraints are generally considered under the rule of reason, and include generally wholesaler-retailer relationships, such as exclusive dealership agreements and resale-price maintenance agreements. If the court finds a restraint to be a per-se violation of Section 1 (i.e., horizontal restraint) then it is not necessary for the court to consider the reasonableness of the justifications for imposition of the restraint. The reasonableness of a restraint is generally determined by a consideration of (a) the identity of the market affected by the restraint, (b) the percentage of the relevant market which is affected by the restraint, (c) the relationship of the percentage of the relevant market which is affected by the restraint to the reasonableness of the restraint.

Several cases have considered the question of per-se violations of the Sherman Act. In *Lorain Journal Co.* v. *United States,* (1951) 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162, the court upheld a District Court decision under Section 2 of the Sherman Act, which is concerned with monopolies or attempts to monopolize, finding that actions by a newspaper publisher in compelling advertisers to boycott a competing radio station resulted in a group boycott.

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* (1959) 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 41, the court reversed and remanded a lower court decision which had allowed a large

merchant to conspire with distributors of certain well-known appliances not to sell to the plaintiff. The Supreme Court held that this was a group boycott, and therefore a per-se violation of the Sherman Act. The court also held that it is not necessary for price fixing or any effect on price to be involved in allegations of violations of the Sherman Act.

In *United States* v. *General Motors,* (1966) 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415, the court reversed and remanded a decision of the District Court of the Southern District of California. The court held that a substantial restraint on price competition is unlawful per se when brought about by a combination or conspiracy to do the same. The court stressed the fact that the joint action of businessmen belonging to certain automobile dealer associations to eliminate "discount or wholesale" sales of new Chevrolets, thus eliminating access to the market to certain individuals, is a per-se violation of the Sherman Act. In this case the court considered the background and reasoning for the restriction on sales, and concluded that the restriction was a violation of the Act.

In *United States* v. *Topco Associates, Inc., supra,* decided March 29, 1972, by the Supreme Court, it was determined that a cooperative association of a group of small and medium-sized independent regional supermarket chains could not establish territorial restrictions on expansion into that of another member's territorial area because it prohibited competition among stores in the area in the sale of Topco brand items. The District Court had applied the rule of reason to the restrictions and found them to be acceptable. It was Topco's contention that being a small operation composed of several small grocery chain operators, it was necessary in order to compete to restrict the sale of merchandise distributed by Topco to member merchants, said merchants each being allocated a territorial area of distribution. The Government argued that this action by Topco pro-

hibits competition between stores in selling Topco brand products. It should be borne in mind that Topco was formed by a group of small chain operations to benefit from collective buying in order to compete with large supermarket chains. The court held that allocating territories to minimize competition is a horizontal restraint, constituting a per-se violation of Section 1 of the Sherman Act. The court cited *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5:

> "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

At page 612 of 405 U.S., Mr. Justice Marshall, writing for the majority, said:

> "For the reasons previously discussed, the arena in which Topco members compete must be left to their unfettered choice absent a contrary congressional determination." (Citing cases.)

Mr. Justice Blackmun, concurring with the result, at page 613 said:

> "The per se rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation."

Worthen argues that the actions of NBI constitute a group boycott which is a horizontal restraint on trade and therefore a per-se violation of Section 1 of the Sherman Act. Generally, group boycotts involve the exclusion of nonmembers from certain services or participation, such as in the case of *United States* v. *Associated Press, supra.* That case involved the by-laws of the Associated Press organiza-

tion, particularly the provisions which prevented a new member from joining the Associated Press services over the veto of a member of the Associated Press who published a newspaper in the same area as the applicant.

In the case now before the court, Worthen is a member of NBI but will be excluded from membership in NBI in accordance with by-law 2.16 because it has acquired a proprietary membership in Interbank. This, of course, is not the typical group boycott situation, but Judge Learned Hand, speaking for the lower court in *Associated Press*, said at page 369 of 52 F.Supp.:

> "But these settled instances are not exhaustive; they are only illustrations of a general doctrine, whose scope they do not measure. When a situation does not fall within one of them, a court is forced to weigh the advantages gained by the combination against the injury done to the public, and apparently in this connection the public is the 'purchasers or consumers' whom the combination will deprive 'of the advantages which they derive from free competition.' " (Citations omitted.)

This court is not unmindful that all cases do not fit within a prescribed niche and that the court must, in examining these problems, look to the ultimate effect on the person served by the business allegedly acting in restraint of trade. Here the answer is obvious. Both merchants and cardholders will be better served if they are allowed to do business with a bank which handles both cards. Despite NBI's arguments to the contrary, the court believes that this will inspire even greater competition between the two systems.

A group boycott is generally considered to be a refusal to deal among certain merchants or manufacturers with other merchants and manufacturers. That is exactly what is happening in this case. NBI, through the by-law passed

by its directors, is refusing to deal with Worthen because Worthen has become an Interbank licensee. The rule imposed by the by-laws results in a refusal to deal between the members of the NBI system with any of their Class A members who also desire to carry the Interbank card, Master Charge. As previously cited cases show, there can be no justification for a rule of this type, and the court has no choice but to strike down the by-law as a per-se violation of the Sherman Act.

NBI argued repeatedly that to allow one bank to own a proprietary membership in both systems would result in a merger of the two card systems, and that this would violate the antitrust laws. Evidently the same argument was made in the Associated Press case, and the court disposed of it in the following manner. At page 374 of 52 F.Supp. the court said:

> "The argument appears to be that if all be allowed to join AP, it may become the only news service, and get a monopoly by driving out all others. That is perhaps a possibility though it seems to us an exceedingly remote one; but even if it became an actuality, no public injury could result. For, if AP were open to all who wished the service, could pay for it, and were fit to use it, it would be no longer a monopoly: a monopoly of all those interested in an activity is no monopoly at all, for no one is excluded and the essence of monopoly is exclusion."

The antitrust laws as reflected in the above statement were made to protect the consumers from the effects of unfair competition as much as they were made to protect businessmen. It is the opinion of this court that by-law 2.16 serves no one's real interest except NBI's.

Therefore, the court is of the opinion that the imposition of by-law 2.16 by NBI is in restraint of trade or commerce

and that such action is a horizontal restraint of trade or commerce and a per-se violation of the antitrust laws. Worthen is entitled to an injunction prohibiting enforcement of by-law 2.16.

The issue of damages in the complaint of Worthen should be deferred until a termination of the question of liability on the part of the defendant, NBI.

Counsel for the parties shall upon receipt of this opinion prepare an agreed praecipe as to the form for entry of judgment in accordance with the above within 10 days.

This 19th day of July, 1972.

JOHN E. MILLER
United States Senior District Judge
Sitting by Designation

INTERLOCUTORY ORDER

This cause came on to be heard on motion of plaintiff for a partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having heard oral arguments; having found that there is no genuine issue as to any material fact except as to the matter of damages, and having concluded that plaintiff is entitled to a partial summary judgment as a matter of law declaring that Section 2.16 of the by-laws of defendant, National BankAmericard Incorporated, violates Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1), that plaintiff is entitled to an injunction prohibiting enforcement of Section 2.16 of defendant's by-laws for the reasons set out in this Court's opinion dated July 19, 1972, and in accordance therewith, the Court having deferred the issue of damages in the Complaint of the plaintiff until a termination of the question of liability on the part of the defendant.

IT IS ORDERED,

1. That summary judgment be and hereby is entered in favor of plaintiff declaring that Section 2.16 of defendant's by-laws violates Section 1 of the Sherman Antitrust Act;

2. The defendant, National BankAmericard Incorporated, be and is hereby permanently enjoined from enforcing Section 2.16 of defendant's by-laws;

3. That the issue of damages in the Complaint of the plaintiff be and hereby is deferred until a termination of the question of liability on the part of the defendant.

This 7 day of August, 1972.

JOHN E. MILLER
United States Senior District Judge
Sitting by Designation

APPENDIX B

Section 2.16 of NBI's Bylaws

Section 2.16. Requirements with Respect to other Credit Cards.

(a) No Class A member shall directly or indirectly (i) own, (ii) issue, (iii) assist in the issuance of, (iv) service, (v) honor, or (vi) enter into contractual relationships with persons for the issuance of, or with merchants to honor, any Credit Cards except (1) as permitted pursuant to sections 2.04 and 2.05, (2) Area Credit Cards, and (3) Credit Cards owned or issued by any organization licensed to conduct the BankAmericard program in a foreign country.

(b) No Class A member shall directly or indirectly accept for deposit or purchase any instruments arising from the use of any Credit Cards, except those arising from (i) Credit Cards issued pur-

suant to sections 2.04 and 2.05, (ii) Area Credit Cards, and (iii) Credit Cards owned or issued by any organization licensed to conduct the Bank-Americard program in a foreign country.

(c) No Class B member shall directly or indirectly (i) enter into contractual relationships with persons for the issuance of Credit Cards except as may be permitted by section 2.05 or (ii) own or issue in its own name Credit Cards, or (iii) appear on Credit Cards or elsewhere as the owner or issuer thereof, except Area Credit Cards.

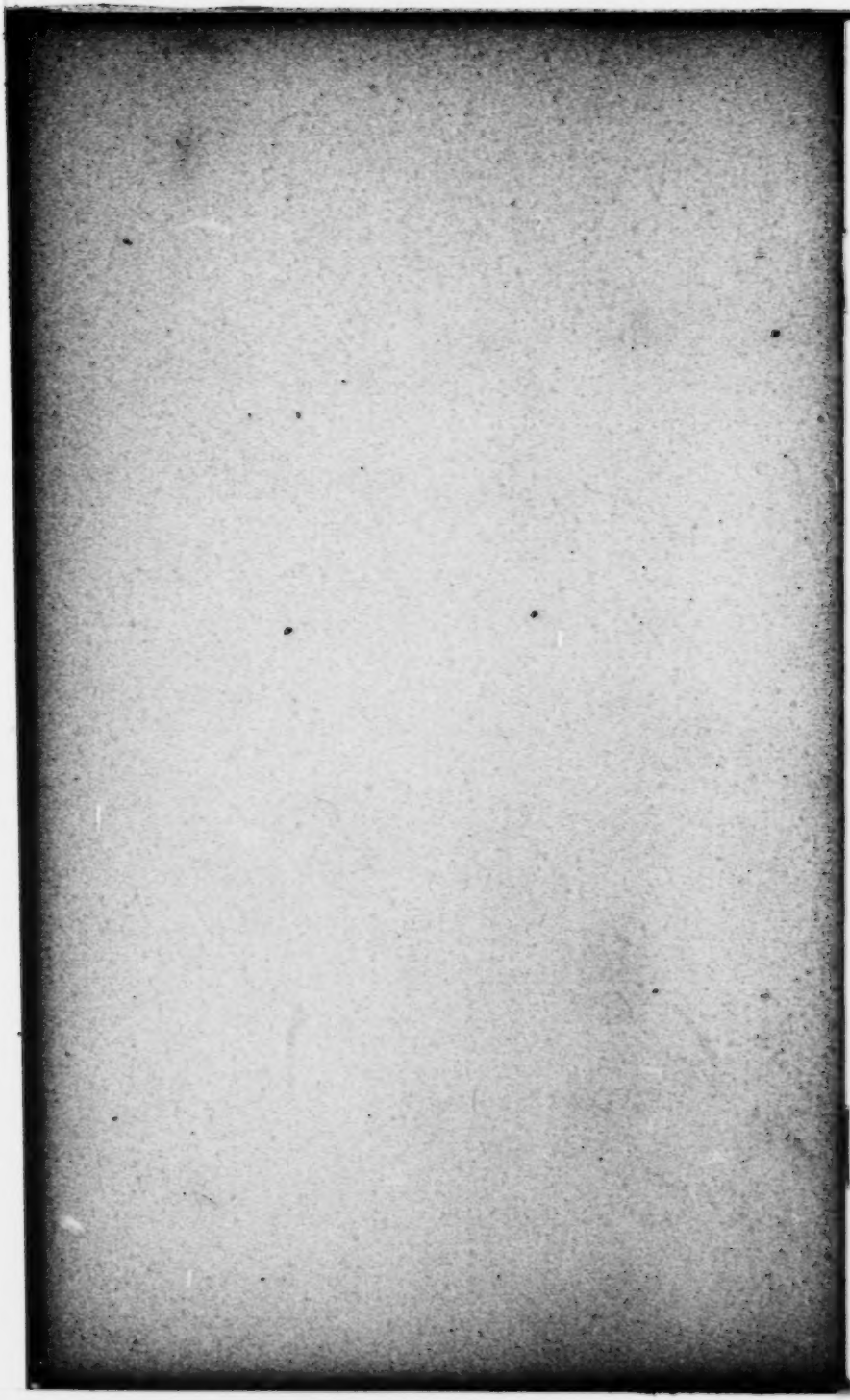
(d) If a parent, subsidiary or affiliate of a member takes any action which the member may not take under the provisions of this section, such member shall be deemed thereby to have violated this section unless, in the case of affiliates, (i) there are no common officers or employees engaged in the management or operation of both BankAmericard and other Credit Card programs and (ii) the operations—including, without limitation, marketing, authorization, credit, collection and solicitation—of such programs are separate; provided that paragraph (c) shall not apply to parents, subsidiaries and affiliates which are Class A members. The provisions of section 2.15 shall apply, without limitation, to all officers and employees engaged in the operation of a member's Credit Card program and to all directors of members.

(e) The provisions of this section shall not apply during periods necessary to (i) convert a credit card program to or from the BankAmericard program or (ii) make an adjustment to a Credit Card program as required for compliance with this section, provided such conversion or adjustment is completed in accordance with such conditions and in such time as the corporation may require, which time shall not exceed twelve months from (1) the effective date of this section, (2) the date of acceptance of membership, (3) the date of delivery of notice of termination, or (4) the date of any future acquisition, merger or

other circumstance which necessitates an adjustment hereunder, as the case may be.

(f) "Credit Cards" as used in this section mean any instruments, whether in the form of a card, book, plate, coupon, or other credit device owned or issued by a bank (including any of its parents, subsidiaries or affiliates) which may be used to obtain money or to purchase or lease property or services on credit but do not include letters of credit or any such instruments usable exclusively for the obtaining of money from such bank or the guaranteeing of checks.

(g) "Area Credit Cards" as used in this section mean any Credit Cards that are owned, issued, serviced, and honored exclusively by one bank and honored by merchants having a direct contractual relationship with such bank, except that such bank may appoint any other bank as its agent with respect to the Area Credit Card program for the sole purpose of accepting for deposit sales drafts from such merchants arising from the use of such Area Credit Cards.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.,
Petitioner,

vs.

NATIONAL BANKAMERICARD INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief in Opposition

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Brief in Opposition

QUESTION PRESENTED

Respondent, National BankAmericard Incorporated (NBI), produces a national bank card under the familiar logo "BankAmericard." Its only national bank card competition is provided by Interbank Card Association (Master Charge), which uses the equally familiar logo "Master Charge." Section 2.16 of NBI's bylaws provide that none of its approximately 240 banks which are the owners of NBI can also become part of the competing Master Charge system. Petitioner, Worthen Bank and Trust Company, one of the owners of NBI, joined Master Charge and sued to enjoin the enforcement of the NBI bylaw pro-

hibiting dual membership. After preliminary and incomplete pretrial discovery, Worthen moved for summary judgment on the ground that the NBI bylaw was a per se violation of the Sherman Act. The facts upon which Worthen based this contention were in conflict. The district court nonetheless granted summary judgment, found upon conflicting facts that the bylaw constituted a "group boycott" and, on this basis, held it per se invalid. The court of appeals held that summary judgment was inappropriate and reversed for trial.[1]

The question presented is whether the court below correctly reversed a summary judgment based on facts which are in conflict.

STATEMENT OF THE CASE

NBI is a for-profit nonstock membership corporation comprised of commercial banks. NBI and its members jointly produce a multipurpose national bank card system under the name "BankAmericard." NBI's principal competitor is the Master Charge national bank card system, the only other multipurpose national bank card system, and the larger of the two.[2]

In October, 1971, NBI adopted section 2.16 of its bylaws. In substance, section 2.16 prohibits owner-members of one

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1. In so ruling, the court of appeals concurred in the views expressed in an *amicus* brief filed by the Department of Justice. This brief was requested by the court, on its own motion, because "After oral argument of this case it became apparent that any decision in this case would affect the bank credit card industry generally • • • [and] the importance of the bank credit card industry to the general public was undisputed • • •" (Appx. to Pet., p. A-2—A-3, fn. 2).

A copy of the *amicus* brief of the Department of Justice has been lodged with the Clerk of this Court.

In the instant brief, "Appx. to Pet." refers to the appendix to the petition for a writ of certiorari. "Appx." refers to the printed appendix filed in the court below.

2. The facts set forth herein are supported by the affidavits of the following persons, filed by NBI in opposition to the Motion for

bank card system from becoming a member of another bank card system (Aff.Hock, par 17, Appx., pp. 84-85).[3]

There are two classes of membership in NBI, Class A and Class B. Class A banks are the proprietary members in the national BankAmericard system. They control and finance the system, and serve on its board of directors. They have the sole right to issue cards, bill and extend credit to cardholders, process and exchange merchants' paper, provide authorization service and perform all other functions associated with and necessary to maintain, improve and service the national bank card system. All Class A members have access to NBI's confidential competitive innovations (Aff. Hock, pars. 3-4, 9, Appx., pp. 70-71, 73).

Class B banks do not issue cards or participate in management. They act only as agents for Class A banks. More than 90 per cent of the banks involved in the national bank card system fit into this category.[4] The agent bank status permits smaller banks to offer credit card services to merchant customers by accepting their sales drafts as agents of the card-issuing members, and to their depositors by requesting their sponsoring Class A bank to issue cards to them. Section 2.16, NBI's challenged bylaw, prohibits only

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Summary Judgment: Dee W. Hock, President and Chief Executive Officer of NBI ("Aff.Hock," Appx., pp. 69-95); Samuel B. Stewart, Chairman of the Board of Directors of NBI ("Aff. Stewart," Appx., pp. 101-106); Jack Elmer, Executive Vice President of Wells Fargo Bank, a member of the Master Charge system and one of the founders of that system ("Aff.Elmer," Appx., pp. 96-100); W. T. Gwennap, Vice President of Pittsburgh National Bank ("Aff.Gwennap," Appx., pp. 109-112); Weyman W. Horadam, Senior Vice President of the Bank of the Southwest, Houston, Texas ("Aff.Horadam," Appx., pp. 107-108).

3. Section 2.16 of NBI's bylaws is quoted in the opinion of the court below (Appx. to Pet., pp. A-6—A-8).

4. At the time the record was established herein, NBI had approximately 250 Class A members, and approximately 3,750 Class B members (Aff.Hock, par. 3, Appx., p. 70).

Class A proprietary banks from belonging to both competing systems (Aff.Stewart, par. 10, Appx., p. 104).

The national bank card system has but recently been developed and has received almost instantaneous wide public acceptance. The industry had its birth in 1966. Less than five years later, by the end of 1971, there were approximately 9,500 banks participating in the two national bank card systems, with more than 48,000,000 cards outstanding and with some 17,000,000 active accounts producing a dollar volume exceeding eight billion dollars—approximately $3,370,000,000 by BankAmericard and $5,000,000,000 by its competitor Master Charge, and over 1,000,000 merchant locations accepting those cards (Aff.Hock, pars. 3, 13, Appx., pp. 70, 81, 82).

The BankAmericard system competes with a number of nonbank card systems. It competes with the so-called T & E (travel and entertainment) cards, i.e., American Express, Carte Blanche and Diners' Club. It competes with local bank cards, and travelers checks. It competes with merchant credit cards such as oil company and airline credit cards, Sears Roebuck, and the like. None of these, however, competes at the level of a nationwide general purpose bank card system. The Master Charge card system is the only other such system (Aff.Stewart, par. 3, Appx., pp. 101-102; Aff.Elmer, par. 7, Appx., p. 98).

A national bank card system requires, among other things: (1) card-issuing banks throughout the country jointly bound together by uniform regulations, issuing readily identifiable cards for use with standard imprinters, sales drafts and merchant and bank terminals. Each card-issuing bank establishes on behalf of all the other associated card-issuing banks a contractual relationship with its cardholders for the extension of nationwide credit (Aff. Hock, par. 10, Appx., pp. 74-75); (2) contracts by the member bank or its agents with merchants whereby the

merchant agrees to honor the cards of the system without regard to whether the card is issued by the particular bank which signed the merchant, and under which the bank gives the merchant immediate credit for all authorized purchases on any card issued by any member bank (Aff.Hock, pars. 10(a), 10(b), 11(a), Appx., pp. 74-78; (3) a system of "interchange," under which the merchant's bank can be reimbursed by the card-issuing bank and the latter can bill its cardholder (Aff.Hock, par. 11(a), Appx., pp. 75-78); (4) a system of "authorization" for enforcing credit limits and preventing fraud and credit losses. On the occasion of each purchase in excess of a "floor limit" the merchant must verify the validity of the card and the credit of the cardholder with his own bank, which, in turn, must obtain authorization from the card-issuing bank before the purchase can be completed (Aff.Hock, pars. 11(b), 11(c), 14, Appx., pp. 78-79, 82-83).[5]

All of the foregoing functions are established and regulated in the bylaws and operating regulations of NBI, and operate through systems developed and owned by NBI and its Class A members, which unite the card-issuing banks in that system into a single unitary organization producing the national bank card and its accompanying services (Aff.Hock, pars. 7-11, Appx., pp. 71-81). Both the BankAmericard and Master Charge systems function only through the coordination by their member banks, operating under rules governing interchange, authorization, credit limits, collection, service, antifraud procedures, etc. A national bank card and the attendant services which give it value are not and cannot be produced by a single

5. The rapidity and accuracy with which transactions can be authorized is of key importance to the success of a national bank card system. A successful authorization program requires sophisticated communication and information feedback networks between member banks throughout the country (Appx. to Pet., p. A-5).

bank. Joint action of all card-issuing banks, operating as a unitary business entity, is required to produce the product (Aff.Hock, pars. 6, 10, 11, Appx., pp. 71, 74-81; Aff. Elmer, par. 18, Appx., p. 100).[6]

In producing a national bank card service, the two national bank card systems compete "for better and more efficient systems; to expand the services provided by the card; for better accounting and statistical reports and evaluations; in advertising and promotion; for operating and technological innovations, including research, analysis and the development of computer systems; for better communications, authorization, interchange, security, credit and collection procedures, cost accounting, statistical analysis, forecasting, budgeting, and other improvements" (Appx., p. 130). These areas of competition involve price equivalent factors used by both systems in seeking merchant participants and cardholders, and affect the cost of the systems with "direct impact upon interest charges and discount rates" (Aff.Elmer, par. 6, Appx., p. 103).[7]

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6. Worthen's own experience illustrates the difference between a local bank card (which can be produced by one bank acting alone) and a national bank card (which must be produced by a joint venture of nationwide banks). From 1959 through 1967, Worthen issued its own local bank card. In those eight years Worthen obtained 14,232 cardholders. In 1968, it became a member of the BankAmericard national bank card system. Its cardholder contracts immediately increased to 111,062 (Pl. Ans. to Interrog. No. 15). The largest percentage of Worthen's bank card business now requires interchange with other NBI banks (Appx., pp. 77-78).

7. The importance of preserving competition between the two systems in the field of research and technological innovations is pointed out in the opinion of the court below (Appx. to Pet., p. A-5).

> "Both systems are actively engaged in improving authorization capabilities by increasing computer utilization.
>
> "Thus:
>
> > 'NBI is presently developing a computerized national authorization system. . . . NBI's initial intent is to develop a nationwide communications system controlled

If member-banks were permitted to be proprietary members of both systems, there would be no incentive to maintain two separate systems. Such interlocking membership would be a merger *pro tanto* of the systems and would lead to the merger nationwide of the two competing systems into a single national bank card system (Aff.Hock, pars. 16, 18, 19, Appx., pp. 84, 85-86; Aff.Stewart, pars. 7, 8, 9, Appx., pp. 103-104; Aff.Elmer, par. 13, Appx., p. 99). With one system only, there could be no threat by merchant or customer when aggrieved by one system to channel the majority of its business to the other, and no incentive for one system to invent new methods, procedures and equipment for the improvement of its system, vis-a-vis the other (ibid.).

The foregoing facts were established by affidavits filed by NBI in response to the motion for summary judgment. In addition, Worthen made the following stipulations for the purpose of the district court's ruling on the motion for summary judgment (Appx. to Pet., pp. A-9—A-10):

"a. NBI acted in complete good faith and for legitimate business reasons, including the desire to preserve and foster competition between the two national credit card systems, when it passed by-law 2.16.

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by a central computer and several regional computers, which can be connected to electronically or optically engineered terminals in merchant or branch locations, capable of reading magnetically or optically encoded cards and providing virtually instantaneous communications for authorizations . . . .' App. 82-83.

"MC [Master Charge]:
'recently formed a subsidiary called International Communication Systems, Inc., ... It is working on providing computer links so that computers in one city can interface with each other and directly authorize cardholder transactions. [MC] is constantly reviewing and trying to improve its interchange system, including its charge-back and clearing procedures.' App. 99."

"b. Bylaw 2.16 serves the legitimate business purposes of NBI and promotes competition between NBI and other national credit card systems.

"c. In spite of bylaw 2.16 there will be vigorous competition in the bank card business.

"d. Without bylaw 2.16 there will be a substantial lessening of competition between the two national systems and an eventual merger of the two systems.

"e. Worthen's real interest in challenging the bylaw was to acquire a monopoly in the bank card industry in Little Rock, Pulaski County, and Arkansas.

"f. NBI's card cannot be produced by any single bank, and the production of the card requires the joint efforts of all banks within the system."

REASONS FOR DENYING THE WRIT

In order to classify NBI's bylaws as a "group boycott," two elements must be established, (1) a group of businessmen who are horizontal competitors, and (2) a collective refusal by them to deal.

The district court based its decision on the assumption of fact that each of the owner-members of NBI is able to produce a national bank card and that each bank competes with other banks in the production of the card (Appx. to Pet., p. A-43). Its conclusion followed, that a concerted refusal to deal by these competitors was a group boycott.[8] Its holding

8. This approach of the court led it to conclude that "The nature of NBI and the nature of Sealy are almost identical" (Appx. to Pet., p. A-43). But in *Sealy* (*United States v. Sealy, Inc.* (1967) 388 U.S. 350), each manufacturer produced a complete mattress, merchantable as such. Neither Worthen nor any other single member of NBI is capable of producing a national bank card. This was stipulated by Worthen in the court below (Appx. to Pet., p. A-10).

disregards the key fact established by NBI's affidavits, viz., that NBI is not a combination of separate entities competing with each other in the production of completed products, but a unitary enterprise jointly producing a single product. The very nature of the nationwide bank card service *requires* that banks, otherwise competing, engage in joint activities in respect of the bank card service in order to make that service available at all.[9]

Collective activity *necessary* for the production of a service has long been recognized as permissible under the antitrust laws.[10] Joint activity under such circumstances being lawful, it also follows, quite apart from the antitrust laws, that a joint venturer may not violate its fiduciary obligations by dividing its loyalties with a competitor and serv-

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9. The cooperative activity of the member banks in the production of the service is, by necessity, a constantly continuing one. As each purchase is in progress (unless the transaction is below the floor limit) the validity of the card and the credit of the customer must be checked by the merchant with his bank, and by that bank in turn with the card-issuing bank, and provisions must be in effect for reimbursement of the merchant bank by the card-issuing bank. The magnitude of this joint and continuing enterprise is shown by the fact that at the time of the hearing in the district court nearly half a million transactions a day involved interchange between the member banks throughout the country (Aff.Hock, par. 11(a), Appx., p. 74).

10. *Associated Press v. United States* (1945) 326 U.S. 1; *United States v. St. Louis Terminal* (1912) 224 U.S. 383; *Appalachian Coals, Inc., v. U.S.* (1933) 288 U.S. 344; *Chicago Board of Trade v. United States* (1918) 246 U.S. 231.

Cases such as *United States v. General Motors* (1966) 384 U.S. 127; *Klor's v. Broadway-Hale Stores* (1959) 359 U.S. 207; *Fashion Guild v. Trade Comm'n.* (1941) 312 U.S. 457, relied upon by Worthen, are beside the point. None involved collective action which was lawful because it was necessary to the production of a service.

ing as a conduit to that competitor of its joint venture's innovations and trade secrets.[11]

Worthen continues to argue its case on the basis of facts which were in conflict in the district court or which are contrary to its own stipulations.[12] It persists in its assumption

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11. As the court below pointed out (Appx. to Pet., p. A-20):
"There is some indication that dual representation of both NBI and MC [Master Charge] would result in the pirating of technological information relating to instantaneous computer verification of credit cards but there is no showing exactly how this might affect NBI and MC or its members."

Section 2.16 of NBI's bylaws, rather than being a "group boycott," simply enforces fiduciary obligations. From the standpoint of the antitrust laws it implements the policy underlying section 8 of the Clayton Act (15 U.S.C. § 19) which forbids interlocking directorates.

12. For examples:
At page 8 of its petition Worthen states as to NBI's intent:
"Worthen moved for partial summary judgment after engaging in enough discovery to be able to demonstrate without contradiction that the bylaw was intended, among other things, to deprive Class A members of NBI of the competitive advantage which they would otherwise have had by participating in the Master Charge program • • •."

In direct contrast, Worthen stipulated:
"NBI acted in complete good faith and for legitimate business reasons, including the desire to preserve and foster competition between the two national credit card systems, when it passed bylaw 2.16" (Appx. to Pet., p. A-9).

"Worthen's real interest in challenging the bylaw was to acquire a monopoly in the bank card industry in Little Rock, Pulaski County, and Arkansas" (Appx. to Pet., p. A-10).

Again, at pages 10 and 12 of its petition, Worthen states:
"The court below did not question that the challenged NBI bylaw prohibiting dual membership in national credit card systems was the product of the concerted and horizontal effort of competing economic entities • • •" (Pet., p. 10) and "The decision below simply stands for the proposition that businessmen • • • may • • • engage in concerted refusals to deal • • •" (Pet., p. 12).

Again, in direct contrast, Worthen stipulated:
"NBI's card cannot be produced by any single bank, and the production of the card requires the joint efforts of all banks within the system" (Appx. to Pet., p. A-10).

that NBI is a combination of competitors rather than a unitary enterprise. This assumption is contrary to the facts set out in NBI's affidavits which, for the purposes of summary judgment, must be accepted as true.

Worthen asserts that the decision of the court below conflicts with decisions of this Court "in suggesting that group boycotts * * * may be reasonable" (Pet., p. 14) if they have "'*any* redeeming value'" (Pet., p. 12), and in holding that the rule of reason must be applied to group boycotts in any new industry (Pet., p. 20). But this ignores the basis of the decision of the court below, viz., that a trial is necessary to resolve conflicting facts with respect to the nature of competition in the national bank card industry. The court below does not call into question any holdings by this Court which proscribe group boycotts, nor does it question that per se conduct is proscribed notwithstanding the possibility of some virtue in the conduct or the newness of an industry. What must be tried under the decision of the court below is whether, once all the facts have been disclosed, a "group boycott" exists.

This issue of fact cannot be resolved by conjuring with labels. As Judge Medina said in *United States v. Morgan* (S.D.N.Y. 1953) 118 F.Supp. 621, 690 (in holding that investment bankers did not violate the antitrust laws when they joined to underwrite a new issue of securities):

> "It matters not whether the members of the team be called 'partners,' 'quasi-partners,' 'joint adventurers' or what not; the significant fact vis-a-vis the Sherman Act is that they are acting together in a single, integrated, unitary, cooperative enterprise, the purpose of which is not 'raising, fixing, pegging, or stabilizing the price' of anything, nor the exercise of any manner of control over general market prices, but solely the distribution of a new security issue in an orderly manner."

And the court added (118 F.Supp. 689):

> "Those who participate as underwriters or dealers are in no sense competitors. When we speak of competitors nothing but confusion will follow unless we first determine what is the 'it' for which the competitors are supposed to be competing. Perhaps a few months before the [new stock] issue under discussion some of the participants were engaged in the underwriting and distribution of a quite different issue of securities, and others of another. But that can have nothing to do with the issue we are talking about. If, as is certainly the case, these participants and dealers are banded together in the enterprise of underwriting and distributing a particular issue, then by very definition they cannot be competitors."

In sum, there is no basis for Worthen's contention that *Topco*,[13] and other group boycott cases, make a determination of facts in the NBI case unnecessary. There is no basis for applying a rule of law until the facts are determined. As the court further pointed out in the *Morgan* case (p. 690):

> "• • • the group of underwriters and dealers, • • • together serve the issuer in making the single, entire, unitary transaction possible by shaping up the issue, underwriting the risk and planning and carrying out the distribution. *Purchases and sales, wholesaling and retailing, of commodities and manufactured products provide no parallel* even remotely resembling the complicated and unitary group action necessary to the successful underwriting and distribution of a new and unseasoned security issue" (emphasis added).

The reasons Worthen proposes as to why review by this Court at this preliminary stage is appropriate (Pet.,

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13. *United States v. Topco Associates* (1972) 405 U.S. 596.

pp. 13-14) have just the opposite thrust. Worthen argues that, under the *Topco* case, the antitrust laws give it the right to combine the two competing bank card systems in itself and to precipitate the merger of the two systems nationwide as other banks follow its lead. Worthen argues that the *Topco* case requires this result even though the practical economic effect would be to reduce competition by eliminating intersystem competition between NBI and Master Charge. If NBI is prevented from demonstrating at trial that Worthen's view of the facts is incorrect, significant competition in a new high-impact industry will have been irremediably eliminated by the merger of the two systems.[14] If, however, Worthen establishes at trial

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14. The court below pointed out (Appx. to Pet., pp. A-20—A-21):

> "The admission, for the purposes of ruling on the motion for summary judgment, that the enforcement of the rule would result in an eventual merger * * * would in itself possibly constitute a violation of the antitrust laws * * *."

And in its *amicus* brief the Department of Justice said (pp. 14-15):

> "The nationwide bank credit card system is a new phenomenon in the rapidly changing field of consumer credit, * * *. The nature and extent of economic competition between such systems, as distinguished from competition among individual member banks in connection with the credit card business, has not been fully explored by courts or economists, and is not yet fully understood. Nor was such an exploration undertaken by the parties for the benefit of the district court in this case. Instead, Worthen and BankAmericard simply stipulated, for purposes of a motion for summary judgment, that the systems were in competition (App. 130).
>
> "We submit that the parties assumed an issue which appears to be crucial to the determination of the economic consequences of BankAmericard By-law 2.16. If competition between the systems is of economic significance, whether directly, or indirectly as it affects competition among members of the two systems, then common membership in the competing systems may raise very serious antitrust problems. For it may result in administration of the two systems by dual members so as to dilute or eliminate that competition, i.e., a

that its view of the facts is correct (contrary to what we believe the evidence will show), no long-range harm will have been done by preserving for the public additional intersystem competition during the pendency of this case.

In sum, contrary to the assertion in the petition for a writ, there is no question of antitrust law ripe for review on this record. Worthen assumes that NBI is a group of separate competitors and argues the application of the group boycott cases. But the evidence submitted by NBI is that NBI is a unitary enterprise. The record presents a diametric conflict of fact as to the fundamental issue to be decided. No argument of law can be in point until the facts are settled at trial.

The court below held (Appx. to Pet., pp. A-20—A-21):

> "In this case, because of the abbreviated record consisting primarily of affidavits and admissions, we do not know exactly how NBI competes with MC on a system level or how the individual member banks compete with each other. There is not a sufficient basis in the record to determine how the proposed rule would affect competition between NBI and MC, if indeed, there is direct competition between the two; or how it would affect competition between member banks in the same geographical area; or how it would affect the overall interest cost to the credit card holders and the discount cost to the merchants from which the banks purchase the paper. * * *

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pro tanto merger of the systems. It may also invite member banks to 'push' one system to the competitive detriment of the other.

"On the other hand, if BankAmericard and Master Charge are not in fact engaged in significant direct or indirect competition at the system level, or if the by-law erects barriers to the establishment of new systems, or restrains inter-bank competition, then there appears to be no economic justification for barring members from belonging to more than one system."

"The bank card industry is a relatively new one and, with over eight billion dollars in annual business, a very large and important segment of our economy. Considering the importance of the industry and the lack of definitive information relating to competition therein, it would be a mistake to determine this case of first impression on a per se basis. This is especially true where it may result in the dilution of competition or the elimination of one of the two competitors, where this is not an aggregate of illegal restraints such as price fixing or exclusive territorial allocations and where the initial purpose in forming the joint venture, to produce a national credit card, is obviously not illegal."

In *Kennedy v. Silas Mason Co.* (1948) 334 U.S. 249, this Court had before it a summary judgment with respect to the application during World War II of overtime provisions of the Fair Labor Standards Act to the manufacture of munitions for the War Department. The Court disapproved of the summary disposal of the case, saying (pp. 256-257):

"The case * * * comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine.

"* * * [S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on

which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-896

Worthen Bank & Trust Company, N.A., ... *Petitioner*

V.

National Bank Americard Incorporated ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF ARKANSAS AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF ARKANSAS AS AMICUS CURIAE

QUESTION PRESENTED

Whether a district court, by grant of summary judgment, may hold per se illegal under Section 1 of the Sherman Act the membership and customer restrictions effected by National BankAmericard Incorporated's by-law 2.16.

INTEREST OF THE STATE

The State of Arkansas does not express an opinion on the merits of this case. Rather, it simply urges the Court to grant certiorari and to rule on the question presented, because: (1) the particular issues involved are of importance to the financial institutions, businesses, and citizens of the State; (2) the case in its present posture has created considerable uncertainty as to the general applicability of per se rules to some types of economic arrangements, especially when "new" industries are involved; and (3) the Court of Appeals opinion appears to be inconsistent with controlling Supreme Court decisions. The State does not file this brief with the intention of promoting the private interests of either party to the litigation; its purpose is to assert a position which reflects the public interest of the State of Arkansas. Accordingly, it is appropriate for the Attorney General of the State to avail himself of the privilege, granted in Supreme Court Rule 42.4, of filing a brief amicus curiae.

In particular, the following concerns move the Attorney General to file this brief:

1. The State on occasion serves as a litigant parens patriae on behalf of its citizens in federal antitrust suits,[1] and in that capacity has an interest in the preservation of the unambiguous applicability of per se rules to certain types of economic arrangements, as presently required by a long line of Supreme Court cases, including at least two, *United States v. Topco Associates, Inc.*, 405 U.S. 596

1. On December 20, 1968, the State of Arkansas filed suit against certain drug companies on behalf of Arkansas consumers for violations of Section 1 of the Sherman Act. *State of Arkansas v. Chas. Pfizer & Co., Inc., et al.*, United States District Court, Eastern District of Arkansas, Western Division, Docket #LR 68 C-254. The settlement of the claims resulted in a distribution to Arkansas hospitals, infirmaries, sanitariums, nursing homes, rehabilitation centers and other institutions of $765,985.52 in December, 1973.

(1972) and *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) in which per se rules were applied by the Court *after* a trial had been held at which the arrangements had been found permissible under the rule of reason.

2. Arkansas has an interest in seeing that there remains the opportunity for development and growth of bank credit card systems other than BankAmericard and Master Charge, whether national or wholly intrastate. The consumers and merchants and bankers, indeed, the public, simply cannot afford to see that growth delayed by years of trial and appeals. The bank card industry is broadly based now. The public impact of a lengthy delay will be even greater if it restricts the entry of thrift institutions and savings and loan associations into a field that has until recently been the private preserve of commercial banks.[2] The industry should be permitted to develop in free competition. The uncertainty generated by the Court of Appeals opinion will retard and inhibit the growth and development of the bank card industry. The consumer, in the final analysis, will bear the burden of the delay. He will be denied services that could otherwise be available to him, and he will be guaranteed the inefficiency that attends retarded development.

3. Arkansas is concerned that the case in its present posture may work to undermine the relatively certain guidelines which the per se rules offer to antitrust

2. The potential entry of thrift institutions into the credit card field gives the industry a new dimension. In September, 1973, the Board of Directors of NBI amended the by-laws to permit, for the first time, mutual savings banks to become members of the BankAmericard system. NBI By-law 2.01. In August, 1973, the Staff Report of the Domestic Finance Subcommittee of the House Banking and Currency Committee recommended broadening the powers of thrift institutions to allow savings and loan associations and credit unions to expand their services to include a wide variety of credit services, including consumer services. C.C.H. Federal Banking Law, ¶ 96, 056. Presumably this would include the power to issue credit cards.

enforcement authorities and to the State's businessmen, and perhaps to deny the very existence of a quick and ready remedy, summary judgment, to an aggrieved litigant who lacks the necessary resources to press his claim through a long and costly trial.

4. Arkansas, as a state which has begun only recently to industrialize, does not have a well-established body of case law interpreting its own antitrust statutes. Therefore, the Attorney General will naturally look to federal antitrust cases, especially those arising in the Eighth Circuit, for guidance in enforcing the Arkansas laws. Moreover, federal authorities, while not binding, will be highly persuasive to our state courts in their attempt to interpret fairly and apply the state statutes. Both the Attorney General and the courts will be aided in their efforts by the presence of a clear pattern of applicability of the per se rules.

5. The State has an interest in maximizing the ability of its citizens to obtain consumer credit when needed. The effect of the Court of Appeals opinion may be to thwart that interest by at least delaying or retarding the growth of bank card systems in Arkansas. This delay may restrict especially the ability of Arkansans to buy on credit outside the State in those areas where one bank card is more widely accepted than another; indeed, it may even discourage some people from exercising their fundamental right to travel to those areas.

6. By delaying the growth of bank card systems, the Court of Appeals opinion may diminish the ability of tourists with one bank card but without another type of bank card to buy on credit, or perhaps even to travel to

Arkansas, a state whose economy is heavily dependent on the tourist industry.[3]

The second and fifth considerations perhaps are more weighty in their application to Arkansas than to most other states for two reasons: Arkansas is still relatively underdeveloped economically, and it is the only state with a constitutional provision limiting to 10% per annum the interest rate on all transactions, including the sales of goods on credit.[4] See, generally, *Arkansas Consumer Credit Market Study*, 1968 Ill. Law Forum, 541; reprinted by the American Bar Foundation, Chicago, Ill.

In any state, the business of becoming an issuing member of a nationwide credit card system is somewhat risky.[5] In Arkansas the cost to banks of taking these risks is increased because the return on investment is not as great as elsewhere.[6] In other states, the typical interest rate limit on sales of goods on credit is 18%.[7] Accordingly, if the bank card industry is going to grow

3. *Tourism in Arkansas*, Ark. Dept. of Parks and Tourism (1972).

4. Ark. Const., Art. 19, Sec. 13, provides that "Contracts for a greater rate of interest than 10% per annum shall be void, as to principal and interest . . ." Upon cancellation of a contract for usury, a purchaser is entitled to retain possession of the subject of the sale. See, e.g. *Universal C.I.T. Credit Corporation v. Avery*, 225 Ark. 190, 280 S.W.2d 229 (1955); *Universal C.I.T. Credit Corporation v. Stanley*, 225 Ark. 96, 279 S.W.2d 556 (1955).

5. On the risks involved, see *Growth and Profitability of Credit Card Banking*, paper by Andrew F. Brimmer, member, Board of Governors of the Federal Reserve System, for 1971 National Credit Card Conference of the American Bankers Association.

6. In this respect it should be noted that individual card-issuing banks own the receivables generated by the use of cards that they issue. The individual bank makes the credit decisions and bears the losses or enjoys the profits of its card operation. NBI and Master Charge are paid annual fees based upon a member's volume of business.

7. There will be an additional demand for consumer credit from financial institutions in Arkansas as a result of the decision by Sears, Roebuck & Co. to discontinue promotions for all revolving charge credit accounts in Arkansas, effective January 15, 1974. Sears blamed the cut-back on increased costs and an "inadequate rate" for retail charge accounts in Arkansas. *Arkansas Gazette*, January 8, 1974, p. 2.

in Arkansas, the growth most likely will come from services offered by financial institutions located within the state.

STATEMENT

The District Court for the Eastern District of Arkansas, 345 F. Supp. 1309 (Hon. John E. Miller) granted Worthen Bank & Trust Company's (Worthen) motion for partial summary judgment, holding that National BankAmericard Incorporated's (NBI) by-law 2.16 constitutes a per se violation of Section 1 of the Sherman Act. Specifically, the District Court held that: (1) NBI is a *horizontal* combination of competitors, on the authority of *United States v. Topco Associates, Inc.*, *supra*, and *United States v. Sealy, Inc.*, 388 U.S. 350 (1962); and (2) NBI's by-law 2.16 constitutes a group boycott, a per se violation of the Sherman Act, Section 1, on the authority of, *inter alia*, *Associated Press v. United States*, 326 U.S. 1 (1945).

The Court of Appeals for the Eighth Circuit, per Circuit Judge Ross, reversed and remanded for trial, holding that: (1) all horizontal membership restraints are not per se illegal, on the authority of the decree of the District Court in *Associated Press*, as approved by the Supreme Court; (2) it is improper to determine a case of first impression on a per se basis, on the authority of *White Motor Co. v. U.S.*, 372 U.S. 253 (1963); and (3) the horizontal restraint here in question presents a case of first impression because it is distinguishable from other categories of horizontal restraints which are per se illegal, and because the industry here involved is a relatively new and rapidly growing one about which too little is known to enable a proper evaluation of the effects of the by-law in question on competition.[8] *Worthen Bank & Trust*

8. In its Brief in Opposition, NBI characterizes the question presented as whether the Court of Appeals correctly reversed a summary judgment based on facts which are in conflict. The issue does not appear to be that simple. The facts in which the Court of Appeals expressed an interest are those touching upon competition between NBI and Master Charge and how the individual banks compete with each other. 485 F. 2d at 129. Further development of those facts became important to the Court of Appeals *only* after it concluded that summary judgment was inappropriate because the per se rules were not properly applied for the three reasons discussed above.

Company v. National BankAmericard Incorporated, 485 F. 2d 119 at 129-130 (8 Cir., 1973).

The United States, per Thomas Kauper, Assistant Attorney General, Antitrust Division, filed a brief amicus curiae in the Court of Appeals, arguing a position essentially identical to that ultimately reached by the Court of Appeals. As authority for the proposition that all collective restraints imposed upon individual members are not illegal per se, the Government cited, in addition to *Associated Press, inter alia, Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344 (1933), and *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918). (Government br., p. 20). Apparently, both the Court of Appeals and the Department of Justice agreed with Worthen and the District Court that NBI is a horizontal combination of competitors.[9]

The factual background of the case, with regard to the parties and to the particulars of the national bank credit card business in general, are well set out in the parties' briefs and in the opinions of the lower courts and need not be reiterated here.

9. In the Brief in Opposition to the Petition, NBI states that it is not a horizontal combination of competitors, but a unitary enterprise. The same can be said of the Associated Press when its member newspapers are engaged in interchanging news on a national basis as opposed to selling newspapers. NBI unquestionably is comprised of banks (485 F. 2d at 120), which are competitors, actual or potential. The Court of Appeals, quoting with approval from the amicus brief filed by the Department of Justice, stated the issue as follows:

> "The question on appeal is whether the district court correctly held that by-law 2.16 is illegal *per se* under Section 1 of the Sherman Act. More precisely the question is whether it is illegal *per se* for a group of banks which are combined in a system to produce a product (or service) that individually none of them is able to produce, but which they sell in competition with each other, to exclude from proprietary membership in their group a bank which is participating in another such system." 485 F. 2d at 126.

ARGUMENT

I.

The Supreme Court should grant certiorari because the opinion of the Court of Appeals is in conflict with a clear line of Supreme Court decisions as to the per se illegality of horizontal restraints of trade. Even if the opinion of the Court of Appeals is affirmed, there should be a clear and definitive treatment by the Supreme Court of the important issues raised. [10]

A. The decree in *Associated Press* is questionable authority for the proposition that horizontal restraints or "bottlenecks" on membership in an association are not necessarily per se illegal as "boycotts." See, *e.g.*, *Neale, The Antitrust Laws of the United States*, pp 66 et seq. The opinion of Judge Hand for the District Court in *Associated Press*, 52 F. Supp. 362, clearly states the view, later accepted by the Supreme Court, that once membership in AP became open to all on reasonable terms, the other two challenged by-laws would not constitute boycotts, for there would be no denial of AP's dispatches, or of Canadian news by AP, except to those who voluntarily decided not to join AP and contribute to the mutual benefit of its members. 52 F. Supp. 362 at 370, 373-375.

On the other hand, the NBI by-law 2.16, standing alone, does constitute a group boycott of card issuing

10. In other cases where, as here, the decision of the Court of Appeals was not a final one, this Court has granted certiorari if the issue presented was, as it appears to be in this instance, fundamental to the further conduct of the case. *E.g., Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949); *Land v. Dollar*, 330 U.S. 731, 734 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1944). The issue in the instant case is also fundamental to law enforcement, and the interests of justice and public policy will not be served by a delay in accepting or rejecting the reasoning of the Court of Appeals as to when the per se rules may be applied to certain trade combinations.

banks in Interbank Card Association (Master Charge) by NBI and a boycott of Master Charge agent banks by NBI insofar as they seek Class A membership in NBI. In addition, the by-law amounts to a horizontal customer restriction in that it prevents NBI Class A banks from enrolling Master Charge card issuers as NBI Class B banks.[11] Thus, NBI by-law 2.16 apparently violates the *principle* of *AP* that membership must be open to all on reasonable terms.

B. *White Motor Co.* is questionable authority for the proposition that a "new" horizontal restraint may not be declared per se illegal by summary judgment.

1. One of the grounds for the Court's reluctance to hold the restrictions in *White Motor* illegal was their *vertical* character, which rendered them inherently more defensible than horizontal restraints of like effect, which restraints were, and are, plainly illegal per se. This is made abundantly clear in the concurring opinion of Justice Brennan in *White Motor* 372 U.S. 253 at 264.

2. Only four years after *White Motor*, the Supreme Court held similar vertical territorial and customer restrictions illegal per se in *U.S. v. Arnold, Schwinn & Co., supra*, in spite of the fact that *there had been a trial* at which the District Court had "explicitly followed the directive of *White Motor* and examined in detail the historical and economic context in which Schwinn's distribution policies were developed and applied" and had found "that the ultimate effect of these policies was to enhance rather than undermine or destroy competition." (Stewart, J., dissenting at 386.) Justice Stewart pointed

11. The customer restriction effect of by-law 2.16 is not mentioned in NBI's Brief in Opposition to the Petition.

out that in *Schwinn* the Court was adopting a per se rule *in spite* of the fact that the Government, *as in this case*, had agreed the rule of reason should be applied. (Emphasis added.) Justice Stewart went on to say that the majority opinion in *Schwinn*

> " . . . completely repudiates the only case in point, *White Motor*. There the manufacturer sold its products to retailers and wholesalers and imposed territorial and customer restrictions on their resale, restrictions much more stringent than those involved here. But the Court in *White Motor* refused to apply a per se rule to invalidate these restrictions, and declared that their legality must be tested under the rule of reason by examining their actual impact in a particular competitive context. The Court today is unable to give any reasons why, only four years later, this precedent should be overruled. Surely, we have not in this short interim accumulated sufficient new experience or insight to justify embracing a rule automatically invalidating any vertical restraints in a distribution system based on sales to wholesalers and retailers."

Thus the decision in *Schwinn* seems to confirm the opinion of Justice Clark, dissenting in *White Motor:*

> "Neither time . . . nor all of the economic analysts, the statisticians, the experts in marketing, or for that matter the ingenuity of lawyers, can escape the unalterable fact that these contracts eliminate competition and under our case are void. The net effect of the remand is therefore but to extend for perhaps an additional five years White Motor's enjoyment of the fruits of its illegal action. *Certainly the decision has no precedential value in substantive antitrust law.*" (Emphasis added.)

C. The fact that the horizontal restraint here involved is not identical to those struck down as per se illegal in the leading cases is a questionable basis for refusal to apply a per se rule here.

1. The Court of Appeals divided the cases relied upon by *Worthen* into three categories: "group boycott" cases, *e.g.*, *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); "Territorial restrictions or price restraint" cases *e.g.*, *Topco*, *Sealy*; and membership restriction or "bottleneck" cases *Associated Press* and *U.S. v. Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800 (D. Kan), aff'd per curiam 355 U.S. 10 (1957), and found that the facts of *Worthen* did not place it within any of those categories. The Court of Appeals then reasoned that, since all horizontal restraints or "membership boycotts" are not per se illegal and since *White Motor* holds that application of a per se rule in summary judgment in a case of first impression is inappropriate, this case must go to trial.

This analysis of *Worthen* by the Court of Appeals is strikingly similar to that of Chief Justice Burger, in his lone dissent in *Topco*. There, the Chief Justice carefully distinguished the case at hand from the eight precedents relied upon by the majority and mentioned *White Motor* in emphasizing the importance of not making "a new per se rule . . . without regard to the impact which the condemned practices may have on competition." 405 U.S. 596 at 620.

In *Topco*, as in *Schwinn*, the Court applied the per se rule in spite of the fact that a full trial had been held, at which the restraints in question had been found permissible under the rule of reason, and notwithstanding

the careful distinctions drawn between *Topco* and the other precedential cases by Chief Justice Burger. Thus the Court's decision in *Topco* seems to reject the mode of analysis later adopted in *Worthen* and to give further evidence of the validity of Judge Hand's statement in *Associated Press*, with regard to then existing line of boycott cases: " . . . these settled instances are not exhaustive; they are only illustrations of a general doctrine whose scope they do not measure." 52 F. Supp. 362, 369.

2. The Court of Appeals recognized that the *Associated Press* and *Nationwide Trailer* cases were most nearly on point in the instant case.

Associated Press was distinguished on the ground that its illegal membership restriction was dissimilar to the NBI by-law challenged by Worthen. However, had AP had an analogous by-law, i.e., one prohibiting its members from joining UP or INS, it would clearly have been illegal. Even Justice Roberts, in his dissent in *Associated Press*, seems to have assumed that such a restriction on dual membership would have been illegal had it then been in force, for he quotes, in support of his own position, a letter of the Attorney General of March 12, 1915:

> " . . . it is no violation of the Anti-Trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association, *provided that no attempt is made to prevent the members from purchasing or otherwise obtaining news from rival agencies.*" 326 U.S. at 34, f.n. 6 (Emphasis added).

The Court of Appeals found the NBI by-law most similar to the AP by-law forbidding its members to sell news to non-members, which was not struck down by the Supreme Court. The problem with this analogy is that once membership in AP was open to all on reasonable terms (including members of UP and INS, as well as competitors of AP members), the 'no news to non-members' by-law no longer constituted a boycott or "bottleneck" at all. That is apparently why that particular AP by-law was not invalidated, even though it was part of the aggregate of trade restraints. On the other hand, the *Nationwide Trailer* provision, virtually identical to the by-law here in question, prevented its members from being connected with a competitive trailer system, and was, in and of itself, a boycott regardless of the accompanying price and territorial allocation agreement and accordingly was permanently enjoined. 156 F. Supp. 800, 807.

D. The possibility that by-law 2.16 may have pro-competitive effects is a questionable ground for asserting the inapplicability of a per se rule to a horizontal market restraint.

At least one of the majority in *Topco* agreed that the restraint then held per se illegal actually would have pro-competitive effects (Blackmun, J., concurring, 405 U.S. at 612-613). This defense has often been raised in Sherman Act cases *e.g.*, *U.S. v. Socony-Vacuum Oil Company, Inc.*, 310 U.S. 150 (1940); *Addyston Pipe & Steel Co. v. United States*, 85 Fed. 271, aff'd. 175, U.S. 211 (1899); *Fashion Originators Guild v. F.T.C.*, 312 U.S. 452 (1941); *United States v. Sealy, supra.* The response of the Supreme Court has been consistent: it is for the government, not private enterprise, to determine what is

necessary to preserve a competitive economy, and if private restraints otherwise violative of our antitrust laws are necessary to that end, Congress must give them a specific exemption. *E.g., United States v. Socony-Vacuum Oil Company, Inc., supra; United States v. Topco Associates, Inc., supra.*

E. The distinction made by the Government in its amicus brief and accepted by the Court of Appeals, between the "product" produced by NBI and those produced by Topco and Sealy is insubstantial, and offers a questionable basis for the conclusion that by-law 2.16 may have no anti-competitive effects.

In its amicus brief, the Government stated that "The 'product' represented by a national credit card requires cooperative relationships among the member banks of a kind not encountered in the sale of products by individual supermarket chains." In other words, "neither Worthen nor any other Class A member of NBI is capable of producing a national bank credit card by itself" (Government Br., p. 19), whereas each of Topco's members could have produced the groceries there in question and each of Sealy's members could have produced the mattresses which bore the Sealy label.

There are at least two questions as to the significance of this distinction: First, assuming the distinction to be valid, in what manner does it operate to increase the reasonableness of by-law 2.16? The nexus between the distinction and the conclusion drawn is nowhere set out in either the Government's brief or the Court of Appeals opinion, and it is not self-evident.

Second, is the distinction really a valid one? Of course

each Sealy plant could produce its own mattresses, bearing its own name (not Sealy's). In fact, the plants did just that, at the same time they were producing the Sealy mattresses. The important fact, however, is that *only* by joining together could the manufacturers produce a mattress marketable nationwide and competitive with Simmons, the nation's largest manufacturer. Recognizing this fact, the members of the Sealy association, after the Supreme Court decision invalidating their practices, *merged* into one company in order to continue producing and marketing the Sealy products which, in terms of *economic significance*, were completely different from the mattresses which the members produced individually, although perhaps physically indistinguishable from them. This same line of reasoning applies with equal force to the products marketed by the Topco members. Conversely, Worthen could produce a credit card and market it in the City of Little Rock, and, to a lesser degree, throughout the State of Arkansas. Indeed, Worthen did just that for many years. However, by banding together with other banks and producing a credit card marketable nationally, Worthen, and other NBI members, like the Topco and Sealy associates, gain "certain economies which they could not otherwise achieve except by association." *Worthen v. NBI, supra* at 128, f.n. 7, referring to *Topco.*

II.

The Supreme Court should grant certiorari in this case because of the uncertainty the Court of Appeals opinion injects into the heretofore clearly emerging pattern of per se rules under Section 1 of the Sherman Act.

The advantages of the per se rules are thought to be so great that they have been applied to certain types of

arrangements even after a particular example of the type had been laboriously examined at trial and found to be within the rule of reason, as in *Schwinn* and *Topco*. Obviously the per se rules are not perfect instruments of judicial administration. They do not allow for the fine judgments which may be made after trial. However, as the Justice Department said in its amicus brief, they enable courts to decide cases without "prolonged and often fruitless economic inquiry." (Government Br., p. 13) Moreover, without the per se rules, businessmen and officials charged with antitrust enforcement responsibility would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.

CONCLUSION

For the foregoing reasons, the State of Arkansas urges the Court to grant the petition for writ of certiorari in the within case.

Respectfully submitted,

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SUPREME COURT, U. S.
JAN 21 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.
Petitioner,

vs.

NATIONAL BANKAMERICARD INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Reply of Respondent to Brief of the State of Arkansas as Amicus Curiae

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The *amicus* brief of the Attorney General of Arkansas misapprehends the nature of the case presented by Worthen's petition to this Court. Like Worthen, the *amicus* brief assumes facts contrary to those established by the affidavits of NBI and by the stipulations of the parties. Thus, the first, third and fourth points made at pages 2-4, discussing the application of the *per se* rule, assume that NBI's bylaw is the concerted action of businessmen, each horizontally competing with the others in the production of a national bank credit card.[1] This is contrary to

1. See particularly *amicus'* summary of its conception of the facts at page 16 in its discussion of the *Sealy* and *Topco* cases. (*United States v. Sealy, Inc.* (1967) 388 U.S. 350; *United States v. Topco Associates* (1972) 405 U.S. 596.

the established and admitted fact that a national bank credit card can be produced *only* by the joint, cooperative action of the owner-members of NBI.[2] The *amicus* brief queries the significance of this fact (p. 15). But the answer is obvious. In such a situation a bylaw requiring the undivided loyalty of each joint venturer to the enterprise cannot constitute a "group boycott." This is illustrated by the *Investment Bankers Case* discussed in our Brief in Opposition.[3] There the court held that the joining together of a group of investment bankers for the purpose of underwriting an issue of securities, at an agreed price and on agreed terms, did not violate the antitrust laws. This, for the reason that the bankers (ordinarily and otherwise competitors) had joined in a unitary, cooperative venture *necessary* to underwrite the issue, and, when so acting, were not competitors in *that* enterprise. From this it followed:

> "'Having [legally] combined, it was proper for each quasi-partner to agree not to cut his other partners' throat'" (118 F.Supp. 689).

Bylaw 2.16 permits Worthen to be an agent bank (a non-participant in ownership and management) in both systems if it wishes. Or it can select Master Charge over NBI and become a member-owner of Master Charge. All bylaw 2.16 says is that if Worthen wishes to remain a joint venturer

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2. In distinguishing the *Topco* case, the court below expressed it thus (Appx. to Pet., A-17, f.n. 7):

> "• • • the Topco arrangement provided its members with certain economies which they could not otherwise achieve except by association. But we agree with the Justice Department that '[T]he "product" represented by a national credit card requires cooperative relationships among the member banks of a kind not encountered in the sale of products by individual supermarket chains.' *Indeed in this case association is required before the 'product' can exist.*" (italics by the court)

3. *United States v. Morgan* (S.D.N.Y. 1953) 118 F.Supp. 621. See our Brief in Opposition, pp. 11-12.

in the NBI system and participate in its management and become privy to all of its competitive innovations, with the fiduciary obligations attaching to such a status, it cannot at the same time become a member of NBI's principal competitor.

Further, quite apart from the unitary aspects of NBI's operation, the facts which must be accepted as true on the present record negate any possibility of holding NBI's bylaw *per se* invalid. Among these are: That NBI acted in good faith and for legitimate business reasons, including the desire to preserve competition between the two national credit card systems, when it passed the bylaw; that the bylaw in fact promotes competition between the two systems, and without the bylaw competition between the systems will be lessened and ultimately eliminated by merger; that the purpose of Worthen's challenge to the bylaw is to acquire a monopoly in the bank card industry in Arkansas (Appx. to Pet., pp. A-9—A-10). No decision of this Court has ever held or suggested that a bylaw adopted for this purpose and having this result constitutes a *per se* violation of the antitrust laws.[4] Neither section

4. See the review by the court below of the pertinent decisions of this Court. Appx. to Pet., pp. A-15—A-19. Among other things the court said (Appx. to Pet., p. A-16):

> "In each of these cases there was a lack of an economic justification, in terms of the need to join together to produce the product being sold. In this case, as conceded by Worthen, it would be impossible for any of the member banks, acting alone, to issue a national bank credit card. It can only be done by a nationwide combination of banks. The facts that in this case there is an economic justification for the existence of NBI in terms of productive capacity, and inferentially a justification for preserving the integrity of that productive capacity, together with the fact that in the cited cases there was a lack of any redeeming virtue, leads us to the conclusion that these cases are not controlling here."

2.16 nor any other provision of NBI's bylaws allocates territories, fixes prices or excludes competitors. Instead, the bylaw enforces well-established fiduciary obligations of joint venturers not to take action destructive of the venture in which they are engaged.[5]

The second, fifth and sixth points in the *amicus* brief (pp. 3-6) express concern that the decision of the court below will inhibit the development and growth of bank card systems in Arkansas to the detriment of Arkansas consumers. This industry, *amicus* says, "should be permitted to develop in free competition," (p. 3). But here again the *amicus* brief sweeps aside the facts established by NBI. These demonstrate that "free competition" will be furthered by the NBI bylaw and would be defeated were Worthen to prevail on its claims that dual membership in both competing systems is required by the anti-

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5. The decisions are clear that every concerted action or joint refusal to deal is not necessarily a "group boycott" and a *per se* violation of the antitrust laws. For example, *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Man. Com.* (5 Cir. 1972) 467 F.2d 178, involved a refusal by a group of airlines to publish certain of plaintiff's tours in a tour guide manual published by the airlines. The refusal was based upon plaintiff's failure to comply with a rule adopted by the airlines requiring that travel bureaus obtain the permission of the hotels involved before publishing the tours in the tour guide manual. Reversing a holding of the district court that the concerted refusal of the airlines to list the tours was a *per se* violation of the antitrust laws, the Fifth Circuit reviewed the authorities and held (467 F.2d 187):

> "In all of these cases, the touchstone of *per se* illegality has been the purpose and effect of the arrangement in question. • • • We conclude that resort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a 'naked restraint of trade.' Absent these factors, the rule of reason must be followed in determining the legality of the arrangement."

The facts established in the preliminary record in the case at bar demonstrate no anticompetitive motive or effect but, on the contrary, a motive and effect of preserving competition and implementing the legitimate business interests of NBI.

trust laws. Worthen's stipulation was specific that the challenged bylaw will prevent the total elimination of competition at the system level by a merger of the only two national bank card systems, and that Worthen's purpose in challenging the bylaw is to obtain a monopoly in the bank card industry in Arkansas.

The *amicus* brief concludes with the suggestion that this Court should grant certiorari at this stage of the case "because of the uncertainty the Court of Appeals opinion injects into the heretofore clearly emerging pattern of per se rules under Section 1 of the Sherman Act" (p. 16). The opinion of the court below injects no uncertainty; it simply holds that before any rule of law can be applied the facts must be known.

CONCLUSION

For the foregoing reasons, and for those stated in our Brief in Opposition, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-896

WORTHEN BANK & TRUST COMPANY, N. A.,
Petitioner,

v.

NATIONAL BANKAMERICARD INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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FIDELITY PRINTING COMPANY, HOUSTON

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In view of the cogent arguments presented by the State of Arkansas as amicus curiae in support of Worthen's petition for certiorari and in response to the arguments contained in NBI's Brief in Opposition, it is unnecessary for Worthen to make other than a brief reply to NBI's arguments in opposition:

1. NBI attempts to sustain the decision below on a ground not relied upon or mentioned by the court below.[1] NBI erroneously suggests that the court below reversed the trial court's granting of summary judgment to Worthen

[1] The tenuous nature of NBI's attempt to support the decision below is characterized by its failure to cite *White Motor*, upon which the lower court so heavily relied, and by its reliance on dicta in a district court opinion (*United States* v. *Morgan*) which was ignored by the court below and which has never been cited with approval by this Court.

"on the basis of facts which were in conflict in the district court." Brief in Opposition, p. 10. The conflict, according to NBI, is whether "NBI is a combination of competitors rather than a unitary enterprise." *Id.* at 11. If there is no group, it follows, according to NBI, that there can be no group boycott. Worthen respectfully suggests that one may search in vain the opinion of the lower court for any reference to conflicting facts as to the nature of NBI and particularly as to any doubt by the lower court that NBI is a combination of separate competing entities. While the court below stated that it lacked information as to "exactly how NBI competes with MC on a system level or how the individual member banks compete with each other" (A-20), at no point in its opinion did the court of appeals point to any conflicting facts as to the nature of NBI as a combination of separate entities competing with each other. Indeed, as viewed by both the lower court and the Department of Justice in its amicus brief, the issue presented by the appeal was "whether it is illegal *per se* for *a group of banks* which are *combined* in a system to produce a product (or service) that individually none of them is able to produce, *but which they sell in competition with each other,* to exclude from proprietary membership in *their group* a bank which is participating in another such system." (A-13) (Emphasis added) The lower court had no difficulty whatsoever in describing the nature of NBI (A-3) or the mechanics of the BankAmericard system (A-4). Implicit in the lower court's recurrent emphasis that NBI members do not engage in price fixing or territorial allocation is the recognition that NBI is clearly a combination of competing business entities. For if that were not the case, there would be nothing unlawful if its members fixed prices or allocated territories. Worthen does not for a moment question that "the very nature of the nationwide bank card service *requires* that banks, otherwise competing, engage in joint activities in respect of the bank card service in order to

make that service available at all." Brief in Opposition, p. 9. Worthen also agrees that "collective activity *necessary* for the production of a service has long been recognized as permissible under the antitrust laws." *Ibid.* But these broad statements beg the question presented here. The question presented here is not whether competing banks may engage in any joint or collective activities, but rather what kinds of joint and collective activities they may engage in. The *per se* rules are commands that certain kinds of joint and collective activities cannot be engaged in and that those who engage in them will not be given the opportunity to prove that they are "required" or "necessary." This Court has clearly established that group boycotts and customer restrictions are among such prohibited activities and are to receive no different treatment than price fixing or territorial allocations.[2] NBI is no more a "unitary enterprise jointly producing a single product" than was the Associated Press and yet this Court never for a moment suggested that the latter should have been given an opportunity to prove its restrictive bylaws were "necessary" for the production of a national news service.

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[2] NBI persists in ignoring the fact that its bylaw does not prohibit dual agent-merchant ("B") banks but does prohibit card-issuing ("A") members of NBI from being agent-merchant ("B") banks in Interbank and "B" members of NBI from being "A" members of Interbank. Thus, NBI avoids responding to Worthen's customer restriction argument and is also able to assert that the bylaw "rather than being a 'group boycott,' simply enforces fiduciary obligations" of joint venturers. Brief in Opposition, p. 10. If that were the purpose of the bylaw 2.16 (as opposed to bylaw 2.15 which, as set out at A-8 n. 4, expressly deals with the issue of confidentiality and which was not challenged by Worthen) and if a "B" member of NBI were a joint venturer, then why does the bylaw permit a "B" member of NBI to be a "B" member of Interbank. If a "B" member is not a joint venturer, then why does the bylaw prohibit a "B" member of NBI from being an "A" member of Interbank. Furthermore, merely because a collective refusal-to-deal has a beneficial effect (*i.e.*, the prevention of information piracy as asserted here or style piracy as asserted in *Fashion Originators*), does not transform it into something other than a "group boycott."

2. The lower court's misapprehension of the nature of the *per se* rules is clearly illustrated by NBI's characterization of what it held:

> "What must be tried under the decision of the court below is whether, once all the facts have been disclosed, a 'group boycott' exists." Brief in Opposition, p. 11.
>
> "There is no basis for applying a rule of law until the facts are determined." *Id.* at 12.
>
> "No argument of law can be in point until the facts are settled at trial." *Id.* at 14.

If by these statements NBI means that a rule of *per se* illegality may not be applied prior to a factual determination that the defendants engaged in certain kinds of proscribed conduct, such statements are correct but irrelevant in the context of this lawsuit. There is no dispute that NBI enacted bylaw 2.16 or as to what the bylaw means and how it operates. If, on the other hand, NBI means that the *per se* rule cannot be applied until "all the facts have been disclosed" at a full trial on the merits, such statements cannot be squared with the prior decisions of this Court explaining that the function of *per se* rules is to avoid such complete factual inquiries and that when *per se* conduct is established, summary judgment is appropriate. There is no factual dispute as to the kind of conduct NBI has engaged in; the only factual dispute is as to the reasonableness of or necessity for its conduct, and that is a dispute which need not be resolved since bylaw 2.16 constitutes a group boycott.

3. NBI launches a frontal attack on *Topco* by arguing, as did Topco Associates, that the application of the *per se* rule here would "reduce competition by eliminating intersystem competition." Brief in Opposition, p. 13. This Court in *Topco* certainly recognized that its decision preserving intrabrand competition might reduce or eliminate inter-

brand competition, yet this Court said it is not for private groups of businessmen to decide which level of competition is most important. If NBI believes that its prohibition of dual membership implements antitrust policy (be it the policy against interlocking directorates or anticompetitive mergers), it can sue Worthen for violations of existing statutes or seek new economic legislation from Congress. *Topco* prohibits it from usurping, by self-regulation, the role of the courts or Congress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing Reply to Brief in Opposition have this the ..... day of January, 1974, been served upon each counsel of record for respondent in accordance with Rule 33 of this Court, by depositing the same in the United States Mail with first-class postage prepaid, addressed to said counsel at their post office addresses.

.....
Stephen D. Susman